Supreme Court, U.S.
FILED

02 403 SEP 12 2002

No.

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Election Campaign Act of 1971, 2 U.S.C. 441b, prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections. The question presented is whether Section 441b's prohibition on contributions violates the First Amendment to the Constitution if it is applied to a nonprofit corporation whose primary purpose is to engage in political advocacy.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	16
Appendix A	1a
Appendix B	41a
Appendix C	61a
Appendix D	63a
Appendix E	71a

TABLE OF AUTHORITIES

Cases:

Athens Lumber Co. v. *FEC*, 718 F.2d 363 (11th Cir. 1983), cert. denied, 465 U.S. 1092 (1984)	14
Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990)	3, 12
FCC v. *Beach Communications, Inc.*, 508 U.S. 307 (1993)	9
FCC v. *Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001)	11
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)	4, 5-6, 10, 11, 12
FEC v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985)	10
FEC v. *NRA Political Victory Fund*, 513 U.S. 88 (1994)	1
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982)	3, 4, 5, 9, 10, 12, 14

Cases—Continued: Page

Kentucky Right to Life, Inc. v. *Terry*, 108 F.3d 637 (6th Cir.), cert. denied, 522 U.S. 860 (1997) 8, 12-13, 14
Mariani v. *United States*, 212 F.3d 761, cert. denied, 531 U.S. 1010 (2000) 14
Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 337 (2000) 11
North Carolina Right to Life, Inc. v. *Bartlett*, 168 F.3d 705 (4th Cir. 1999), cert. denied, 528 U.S. 1153 (2000) 12
United States v. *Bajakajian*, 524 U.S. 321 (1998) 9

Constitution, statutes, and regulations:

U.S. Const. Amend. I 2, 5, 6, 14, 15
Act of Jan. 26, 1907 (Tillman Act), ch. 420, 34 Stat. 865 2
Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070:
§ 301, 43 Stat. 1071 3
§ 313, 43 Stat. 1074 3
Federal Election Campaign Act of 1971, 2 U.S.C. 441b *et seq.*:
2 U.S.C. 441b ..... *passim*
2 U.S.C. 441b(a) 2, 3
2 U.S.C. 441b(b) 4
2 U.S.C. 441b(b)(2)(C) 3, 12
Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (18 U.S.C. 610) 3
28 U.S.C. 518(a) 1
11 C.F.R.:
Section 114.2 6
Section 114.2(b) 6
Section 114.10 6
28 C.F.R. 0.20 1

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Election Commission (FEC), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1]

[1] The FEC did not request the Solicitor General to seek certiorari on its behalf in this case. But because this case is one "in which the United States is interested," 28 U.S.C. 518(a)—and indeed involves the constitutionality of a federal statute—the Solicitor General is responsible for conducting and controlling any litigation in this case in this Court on behalf of the FEC and, more generally, the United States. See *ibid.*; 28 C.F.R. 0.20; see also *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994).

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 278 F.3d 261. The opinion of the district court (App., *infra*, 41a-60a) is reported at 137 F. Supp. 2d 648.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2002. A petition for rehearing was denied on May 16, 2002 (App., *infra*, 61a-62a). On August 5, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law * * * abridging the freedom of speech." The Federal Election Campaign Act of 1971, provides in part: "It is unlawful * * * for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a). Section 441b of the FECA is reprinted in the appendix. App., *infra*, 71a-75a.

STATEMENT

1. For nearly a century, Congress has prohibited corporations from directly contributing to campaigns and making certain expenditures in connection with federal elections.[2] The Federal Election Campaign Act

[2] In 1907, Congress prohibited any corporation from making a "money contribution" in connection with federal elections. Act of Jan. 26, 1907 (Tillman Act), ch. 420, 34 Stat. 864-865. Congress later extended that prohibition to "anything of value," and made it a crime for a candidate to accept corporate contributions. Federal Corrupt Practices Act of 1925, ch. 368, §§ 301, 313, 43 Stat. 1071, 1074. The prohibition was expanded to include "expenditure[s]" in 1947. Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (codified at 18 U.S.C. 610). The prohibition is currently codified in 2 U.S.C. 441b.

of 1971 (FECA) provides that it is unlawful for a corporation or labor union "to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a). That prohibition was intended to combat "the problem of corruption of elected representatives through the creation of political debts," *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (*NRWC*) (quotation omitted), and targets corporations because they "receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process." *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990).

At the same time, however, Congress has sought to enable individuals affiliated with corporations to participate in voluntary political activity under the sponsorship of a corporation. The FECA thus authorizes corporations to make expenditures for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation." 2 U.S.C. 441b(b)(2)(C). Such a fund is commonly known as a political action committee, or PAC. A corporation may solicit PAC funds from stockholders, certain employees, or members, and a PAC in turn may make both direct contributions and independent expenditures in connection with federal elections. 2 U.S.C. 441b(b); see *NRWC*, 459 U.S. at 200 n.4.

2. This Court has considered the operation of Section 441b of the FECA on several occasions. In *NRWC*, the Court upheld the FEC's position that a nonprofit advocacy corporation, the National Right to Work Committee (NRWC), had violated Section 441b by soliciting contributions to its PAC from individuals who were not members of NRWC. In so holding, the Court rejected the contention that its interpretation of the FECA raised a constitutional problem. See 459 U.S. at 206-209. The Court explained that Congress's interests in enacting Section 441b—in particular, its effort to address "the problem of corruption of elected representatives through the creation of political debts"—justified any burden imposed by Section 441b on the political activity at issue. *Id.* at 208; see *id.* at 208-209.

After reviewing the federal limits on corporate campaign contributions, the Court further stated that "[t]his careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference * * * [and] reflects a permissible assessment of the dangers posed by those entities to the electoral process." *NRWC*, 459 U.S. at 209. The Court recognized that Section 441b's prohibition on direct corporate campaign contributions applied to corporations "without great financial resources, as well as those more fortunately situated," but it concluded that deference was called for to Congress's judgment that "prophylactic measures" were necessary to protect the integrity of the electoral process from "actual and apparent corruption." *Id.* at 209-210.

In *Federal Election Commission* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), the Court held that Section 441b's prohibition on independent *expenditures* violated the First Amendment as

applied to a nonprofit advocacy corporation, Massachusetts Citizens for Life (MCFL). In so holding, the Court found that because MCFL's resources "in fact reflect popular support for [its] political positions," *id.* at 258, it did not pose the "danger of corruption" justifying the regulation of election expenditures by corporations organized for economic gain. *Id.* at 259.[3] The Court rejected the argument that *NRWC* compelled a different result, emphasizing that *NRWC* involved application of the prohibition of *contributions*, not expenditures. *Ibid.* As the Court explained, "[i]n light of the historical role of contributions in the corruption of the electoral process," "the Government enjoys greater latitude in limiting contributions than in regulating independent expenditures." *Id.* at 260, 261-262.[4]

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[3] The Court stated that MCFL had three features "essential" to its holding: "it was formed for the express purpose of promoting political ideas, and cannot engage in business activities," "it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 263-264.

[4] Chief Justice Rehnquist, joined by Justices White, Blackmun, and Stevens, dissented from "the Court's decision to 'second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.'" 479 U.S. at 266 (quoting *NRWC*, 459 U.S. at 210). In their view, the "legitimate concerns arising from corporate campaign spending" that the Court recognized in *NRWC* were also sufficient to justify the regulation on political activity at issue in *MCFL*. *Id.* at 267. The nature of the corporation in *MCFL* did not alter that conclusion, since, as the dissenters pointed out, "[t]he corporation whose fund was at issue [in *NRWC*] was not unlike MCFL—a nonprofit corporation without capital stock, formed to educate the public on an issue of perceived public significance." *Id.* at 269.

3. This case involves a First Amendment challenge brought by a nonprofit advocacy corporation, respondent North Carolina Right to Life, Inc. (NCRL), and certain individuals, to 2 U.S.C. 441b, and two regulations promulgated thereunder, 11 C.F.R. 114.2 and 114.10.[5] Respondents sought a declaration that those provisions are unconstitutional both on their face and as applied to NCRL, and an injunction against their enforcement. In October 2000, the district court granted respondents' motion for summary judgment and held that Section 441b and the regulations are unconstitutional as applied to NCRL with respect to both campaign contributions and independent expenditures, but it declined to hold the provisions unconstitutional on their face. App., *infra*, 41a-60a. In January 2001, the district court permanently enjoined the FEC from enforcing violations of Section 441b and the regulations against NCRL. *Id.* at 63a-68a.

4. a. The court of appeals affirmed. App., *infra*, 1a-40a. The court held that Section 441b and the implementing regulations are unconstitutional as applied to NCRL with respect to both independent expenditures and campaign contributions, but, like the district court, rejected the argument that the provisions are unconstitutional on their face. Relying on prior circuit precedent, the court found that NCRL is in all material respects like the nonprofit advocacy corporation in *MCFL*, and held that *MCFL* and circuit precedent

[5] The first regulation (11 C.F.R. 114.2(b)) prohibits campaign contributions and expenditures in connection with federal elections by any corporation and, thus, tracks the prohibition contained in Section 441b. The second regulation (11 C.F.R. 114.10) exempts from the prohibition on independent *expenditures* corporations that share the same basic features of the corporation in *MCFL*. See App., *infra*, 3a-4a, 49a-50a.

compelled the conclusion that Section 441b's prohibition on election expenditures could not constitutionally be applied to NCRL. See *id.* at 6a n.2, 20a-21a.

The court then reached the same conclusion with respect to Section 441b's prohibition on campaign contributions by NCRL. App., *infra*, 25a. In so holding, the court rejected the FEC's argument that *NRWC* called for a different result with respect to contributions, as opposed to expenditures. *Id.* at 26a-27a. The court explained that *NRWC* "did not decide the constitutionality of the corporate ban provision as applied to MCFL-type corporations," but instead addressed only the constitutionality of the bar preventing a nonprofit corporation from using its funds to solicit non-members to contribute to its PAC. *Id.* at 27a. Moreover, the court continued, "[t]he rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions." *Id.* at 25a. Thus, under the court's decision, "the distinction between contributions and expenditures [is] immaterial in this case." *Id.* at 29a.

b. Judge Gregory concurred in part and dissented in part. App., *infra*, 35a-40a. He agreed with the court's analysis of Section 441b insofar as it concerned independent expenditures, but dissented with respect to campaign contributions. In Judge Gregory's view, the court's holding that NCRL was entitled to "an *MCFL*-type exemption for its campaign contributions * * * is inconsistent with [*NRWC*]." *Id.* at 35a. Pointing to the discussion of *NRWC* in the majority and dissenting opinions in *MCFL*, he concluded that the Court in *MCFL* had addressed the "very question" in this case, *i.e.*, the "constitutional difference between contributions and independent expenditures in the context of

§ 441b." *Id.* at 38a-39a. Moreover, Judge Gregory concluded that this Court's treatment of that question in "*NRWC* is dispositive with respect to § 441b's ban on corporate contributions." *Id.* at 40a.

Judge Gregory also pointed to the Sixth Circuit's decision in *Kentucky Right to Life, Inc.* v. *Terry*, 108 F.3d 637, cert. denied, 522 U.S. 860 (1997). As discussed below, in that case the Sixth Circuit—specifically relying on *NRWC*—upheld a state-law prohibition on campaign contributions by nonprofit advocacy corporations. Judge Gregory stated that he "would join the Sixth Circuit in upholding § 441b(a)'s ban on [campaign] contributions by non-profit ideological corporations such as NCRL." App., *infra*, 35a.

c. The Fourth Circuit denied the FEC's petition for rehearing en banc by a vote of seven to four. App., *infra*, 61a-62a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the prohibition on campaign contributions in Section 441b of the FECA is unconstitutional as applied to a nonprofit advocacy corporation such as respondent NCRL. In reaching that result, the panel below divided over the import of this Court's decision in *NRWC*, which involved application of Section 441b's prohibition on corporate campaign contributions to a nonprofit advocacy corporation similar to NCRL. The court of appeals' decision in this case conflicts with the Sixth Circuit's decision in *Kentucky Right to Life*, where the court—explicitly relying on *NRWC*—upheld a state-law prohibition on corporate campaign contributions by nonprofit advocacy corporations. The question presented is one on which uniformity is needed. Review by this Court is thus warranted.

A. Congress has long prohibited corporations from directly contributing to campaigns in connection with federal elections. See *NRWC*, 459 U.S. at 208-209; note 2, *supra*. The court of appeals' decision in this case declares that prophylactic measure—now contained in 2 U.S.C. 441b—unconstitutional as applied to nonprofit advocacy corporations such as respondent NCRL. The fact that an Act of Congress has been declared to be unconstitutional in a significant respect is itself a compelling ground for certiorari. See, *e.g.*, *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

B. The court of appeals' decision directly implicates this Court's decision in *NRWC*. As discussed above, in *NRWC* the Court agreed with the FEC that a nonprofit advocacy corporation had violated Section 441b by soliciting funds from nonmembers to be used by its PAC to make campaign contributions. 459 U.S. at 201-206. In so holding, the Court addressed Section 441b's categorical prohibition on direct corporate campaign contributions, and concluded that application of that prohibition to a nonprofit advocacy corporation such as the respondent in *NRWC* is constitutional, even though such a corporation may lack "great financial resources." *Id.* at 210; see p. 4, *supra*.

It is true that *NRWC* considered whether the nonprofit corporation at issue had violated Section 441b by soliciting PAC funds from certain persons. 459 U.S. at 198. But, as the Court recognized in *NRWC*, Section 441b's limits on PAC solicitations must be read in light of the statute's general prohibition on corporate contributions. Thus, in considering whether the solicitation limits were constitutional as applied to NRWC, the Court in *NRWC* discussed at length the broader prohibition on non-PAC contributions. *Id.* at 207-209.

Indeed, the Court stated that the question regarding solicitation of "members" was "but the tip of the statutory iceberg," which included the prohibition on direct corporate campaign contributions. *Id.* at 198 n.1. Furthermore, in deciding *NRWC*, the Court reviewed both the "statutory prohibitions," *i.e.*, the prohibition on direct corporate campaign contributions, and the "exceptions," *i.e.*, the provisions allowing such contributions through PACs. *Id.* at 208.

In subsequent decisions, this Court has read *NRWC* broadly with respect to its general treatment of Section 441b's ban on direct campaign contributions by a nonprofit advocacy corporation. For example, in *Federal Election Commission* v. *National Conservative Political Action Committee*, 470 U.S. 480, 500 (1985) (*NCPAC*), the Court stated that, in *NRWC*, "we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter [the type of corporation in *NRWC*] might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit."

MCFL is also instructive. As discussed above, in *MCFL* this Court held Section 441b's prohibition on independent expenditures to be unconstitutional as applied to a nonprofit advocacy corporation. In so holding, this Court specifically distinguished *NRWC*, emphasizing that "the political activity at issue in that case was *contributions*," not expenditures. 479 U.S. at 259 (emphasis added). In distinguishing *NRWC*, the Court further recognized that it has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending," and that "the Government enjoys greater

latitude in limiting contributions than in regulating independent expenditures." *Id.* at 259-260, 261-262.

As the dissenters in *MCFL* emphasized, the corporation in *NRWC* was quite similar to the one in *MCFL*—both were "nonprofit corporation[s] without capital stock, formed to educate the public on an issue of perceived public significance." 479 U.S. at 269. As a result, it would be difficult to reconcile the analysis in *MCFL* with that in *NRWC* without the distinction that the Court explicitly drew in *MCFL* between contributions and expenditures. *Id.* at 260. That distinction, moreover, has been emphasized throughout this Court's campaign financing decisions. See, *e.g.*, *FEC* v. *Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 431 (2001) (The Court's "cases have respected th[e] line between contributing and spending"); *Nixon* v. *Shrink Mo. Gov't PAC*, 528, U.S. 377, 386, 387 (2000); *MCFL*, 479 U.S. at 259-260; *NCPAC*, 470 U.S. at 497.

The court of appeals' decision in this case invalidates the same prohibition on corporate political contributions involved in *NRWC*, as applied to a nonprofit advocacy corporation analogous to the one in *NRWC*. In addition, the court of appeals concluded that "the distinction between contributions and expenditures [is] immaterial in this case," App., *infra*, 29a, and that, instead, the rationale of *MCFL* with respect to expenditures is "equally applicable in the context of direct contributions." *Id* at 25a. As Judge Gregory explained, that analysis is difficult to square with this Court's decision in *NRWC*, as well as with the Court's discussion of *NRWC* in *MCFL*. See *id.* at 36a-40a.[6]

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[6] The court of appeals stated that Section 441b constitutes "a complete ban on NCRL's making contributions." App., *infra*, 12a. As discussed above, Section 441b allows corporations to establish

C. The court of appeals' decision creates a conflict in the circuits over the constitutionality of laws prohibiting direct campaign contributions by nonprofit advocacy corporations. In *Kentucky Right to Life*, the Sixth Circuit upheld a state law that prohibited, *inter alia*, corporations from making direct campaign contributions and expenditures in connection with state and local elections. See 108 F.3d at 639, 640 & n.3 (discussing legislative scheme). The plaintiffs in that case argued that nonprofit advocacy corporations—such as Kentucky Right to Life, Inc.—could not constitutionally be barred from making campaign contributions in connection with such elections. *Id.* at 645. And, in doing so, they maintained "that the reasoning underlying *NRWC* does not apply to nonprofit corporations like KRL because nonprofit corporations do not have the resources to amass the political 'war chests' which spurred Congress to enact the statute at issue in *NRWC*." *Id.* at 646. The Sixth Circuit disagreed.

The Sixth Circuit explained that, despite the "broad application" of Section 441b of FECA, this Court in *NRWC* deferred to Congress's judgment that "prophylactic measures" were needed to combat the problems posed by campaign contributions, even in the case of a nonprofit corporation, such as the plaintiff in *NRWC*. See 108 F.3d at 646. Indeed, the Sixth Circuit

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PACs, which in turn may make campaign contributions. See *Austin*, 494 U.S. at 658 (Section 441b requirements for establishing a PAC "do not stifle corporate speech entirely"); *MCFL*, 479 U.S. at 259 n.12 (bar to non-PAC corporate independent expenditures "is of course distinguishable from the complete foreclosure of any opportunity for political speech"); *NRWC*, 459 U.S. at 200 n.4; see also 2 U.S.C. 441b(b)(2)(C). NCRL has previously established such a PAC. See *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 709 (4th Cir. 1999), cert. denied, 528 U.S. 1153 (2000).

held that "the reasoning of *NRWC* applie[d] *directly*" to the challenge to the statute at issue in *Kentucky Right to Life*. *Ibid.* (emphasis added); see *ibid.* ("Because the Supreme Court upheld broad federal prohibitions against direct corporate contributions as constitutionally permissible to limit potential corruption, we likewise uphold the * * * restrictions [in this case].").

The Sixth Circuit rejected the plaintiffs' argument that this Court's decision in *MCFL* drew "a meaningful distinction between for-profit and nonprofit corporations" for purposes of analyzing a ban on corporate contributions. 108 F.3d at 646. The court explained that, "[a]lthough the Court in *MCFL* distinguished between nonprofit and for-profit corporations with respect to independent expenditures, it reiterated the *NRWC* conclusion that a legislature may restrict direct contributions to political candidates from both for-profit and nonprofit corporations in order to limit the potential for corruption commensurate with those contributions." *Ibid.* "Consequently," the Sixth Circuit held, the "distinction between nonprofit and for-profit corporations simply does not apply to regulation of direct corporate contributions." *Ibid.*

As Judge Gregory recognized, although *Kentucky Right to Life* involved a challenge to a state prohibition on corporate campaign contributions rather than to the federal prohibition in Section 441b of the FECA, the Sixth Circuit's decision in that case is directly contrary to the Fourth Circuit's decision below. See App., *infra*, 35a. Both cases involved First Amendment challenges to laws barring nonprofit and other corporations from making direct campaign contributions. In *Kentucky Right to Life*, the Sixth Circuit looked to this Court's decision in *NRWC* and held that the First Amendment does not preclude such a prohibition. See 108 F.3d at

646. By contrast, in this case the Fourth Circuit rejected reliance on *NRWC* and held that such a prohibition is unconstitutional. App., *infra*, 26a-27a.[7]

D. The question presented is undeniably important. Congress has determined that a prophylactic rule against direct corporate contributions is necessary to prevent both "actual and apparent corruption" in federal elections. *NRWC*, 459 U.S. at 209-210. The court of appeals' decision in this case declares that prophylactic rule—in Section 441b of the FECA—to be unconstitutional as applied to nonprofit advocacy groups such as NCRL. The district court itself stated that a "great number of corporations" may fall within the exemption created by the decision below with respect to corporate contributions. App., *infra*, 66a. Moreover, by their very nature, such corporations have an obvious interest in participating in and, indeed, in influencing the outcome of federal elections. Accordingly, the decision below is likely to have an immediate impact.

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[7] Other circuits also have read this Court's decision in *NRWC* as generally affirming the constitutionality of Section 441b's ban on direct corporate contributions. In *Athens Lumber Co.* v. *FEC*, 718 F.2d 363, 363 (1983) (en banc) (per curiam), cert. denied, 465 U.S. 1092 (1984), the Eleventh Circuit rejected a constitutional challenge, *inter alia*, to Section 441b's ban on corporate contributions, explaining that the case was "controlled" by this Court's decision in *NRWC* upholding that ban. Similarly, in *Mariani* v. *United States*, 212 F.3d 761, 772 (en banc), cert. denied, 531 U.S. 1010 (2000), the Third Circuit stated that it was "constrained to read *NRWC*, and the Court's statements on *NRWC* in *Nat'l Conservative PAC*, as at least strong suggestions that § 441b(a) is constitutional" insofar as it prohibits "contributions from corporate treasuries." Although neither *Athens Lumber* nor *Mariani* involved the application of Section 441b to a nonprofit advocacy corporation, the decisions nonetheless read *NRWC* more broadly than did the Fourth Circuit in this case.

There is a clear need for uniform campaign financing rules governing federal elections across the country. Many if not most nonprofit advocacy corporations operate in several different States. Under the injunction upheld by the Fourth Circuit in this case, respondent NCRL would not be prohibited under Section 441b from contributing to a senatorial campaign in Ohio. However, in the Sixth Circuit, it would be a violation of Section 441b for that senatorial campaign to receive such a contribution. Moreover, an organization similar to NCRL but located within the Sixth Circuit would be prohibited from making an identical contribution to the same senatorial campaign. That situation creates inequality among potential corporate contributors, and potential chaos and confusion as to which campaign financing rules apply to which political contributions, and which recipients of such contributions.

In short, guidance is needed from this Court concerning whether, consistent with the First Amendment and this Court's precedents, Section 441b may be applied to a nonprofit advocacy corporation, such as NCRL, that seeks to make direct campaign contributions in connection with a federal election.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-1348, 01-1479

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS-APPELLEES

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLANT

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS-APPELLANTS

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLEE

Argued: Oct. 31, 2001
Decided: Jan. 25, 2002

OPINION

Before: WILKINSON, Chief Judge, and WIDENER and GREGORY, Circuit Judges.

WILKINSON, Chief Judge.

Plaintiffs North Carolina Right to Life, a nonprofit advocacy corporation, its officers, and an eligible voter in North Carolina filed a challenge to 2 U.S.C. § 441b(a) of the Federal Election Campaign Act and two imple-

menting regulations. The district court held that these provisions violated the plaintiffs' First Amendment right to make expenditures and contributions in connection with federal elections. However, the court declined to facially invalidate § 441b(a) and the regulations. We conclude that these provisions burden the First Amendment speech and association interests of nonprofit advocacy groups. We further hold that the prohibition on independent expenditures is not narrowly tailored to serve a compelling governmental interest, and that the proscription on contributions is not closely drawn to match a sufficiently important interest. *Buckley* v. *Valeo*, 424 U.S. 1, 24-25, 44-45, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 387-88, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000). However, because the provisions at issue are constitutional in the overwhelming majority of applications, we decline to invalidate them facially and affirm the judgment of the district court.

I.

Plaintiffs North Carolina Right to Life ("NCRL"), Christine Beaumont, Loretta Thompson, Stacy Thompson and Barbara Holt are challenging 2 U.S.C. § 441b(a) of the Federal Election Campaign Act ("FECA") and two implementing regulations, 11 C.F.R. §§ 114.2(b) and 114.10. NCRL is a nonprofit corporation, exempt from federal taxation under § 501(c)(4) of the Internal Revenue Code. NCRL is a charitable organization that, *inter alia*, provides crisis pregnancy counseling, publishes crisis pregnancy literature, and promotes alternatives to abortion. NCRL has no shareholders and none of its earnings inure to the benefit of any individual. Christine Beaumont is an eligible voter in North

Carolina. Loretta Thompson is Vice President of NCRL. Stacy Thompson is a member of NCRL's Board of Directors, and Barbara Holt is President of NCRL.

Plaintiffs filed this action against the Federal Election Commission ("FEC" or "Commission") on January 3, 2000, challenging the constitutionality of FECA's prohibitions on corporate independent expenditures and contributions in connection with federal elections. Plaintiffs sought declaratory and injunctive relief, arguing that 2 U.S.C. § 441b(a) and two regulations promulgated thereunder violated their First Amendment right to make independent expenditures and contributions in connection with federal elections. Plaintiffs moved for summary judgment and the FEC moved for partial dismissal and partial summary judgment.

Section 441b(a) makes it "unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any election" for federal office. And accompanying regulation 11 C.F.R. § 114.2(b) prohibits all corporate contributions to federal candidates and all expenditures made by non-qualified corporations. The exemption for qualified corporations was created in response to the Supreme Court's decision that § 441b(a)'s prohibition on independent expenditures from a corporation's general treasury was unconstitutional as applied to Massachusetts Citizens for Life ("MCFL"), a small, non-profit political advocacy corporation. *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) ("*MCFL*"). The Court identified three non-profit characteristics of MCFL that were essential to its holding that the group could not constitutionally be bound by § 441b(a)'s restriction on independent spend-

ing.[1] The FEC rigidly codified these three characteristics in 11 C.F.R. § 114.10. Corporations that meet the criteria in 11 C.F.R. § 114.10 are "qualified non-profit corporation[s]" not subject to the prohibition on independent expenditures of § 441b(a) and 11 C.F.R. § 114.2(b). NCRL did not qualify for the 11 C.F.R. § 114.10 exemption and challenged the regulation for that reason.

The district court, on October 3, 2000, recognized that "the importance of campaign contributions and expenditures as political speech is beyond question," and held that NCRL had established a First Amendment right to make independent expenditures and limited contributions. *Beaumont* v. *FEC*, 137 F. Supp. 2d 648, 651, 658 (E.D. N.C. 2000). The court then determined that there were two possible remedies: (1) declare the provisions of FECA unconstitutional as applied to NCRL, or (2) declare the provisions of FECA facially unconstitutional. *Id.* at 658. Instead of determining a remedy on October 3, the court required the parties to address the scope of declaratory relief and stayed the effect of the October 3 ruling until it issued a final order. *Id.* at 658.

On January 21, 2001, the district court held that 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 were unconstitutional as applied to NCRL, and permanently enjoined the FEC from enforcing violations of those sections against NCRL. The district court declined to hold the provisions of FECA facially unconstitutional because NCRL failed to demonstrate that "the constitutional infringements caused by 2 U.S.C. § 441[b(a)] and the related regulations are 'substantial' in relation to their 'plainly legitimate sweep.'" The FEC appeals and the plaintiffs cross-appeal the district court's decision not to hold 2 U.S.C. § 441b(a) facially unconstitutional.

[1] First, MCFL was created to promote political ideas, and could not engage in business activities. Second, it had no shareholders or other persons with a claim on its assets or earnings. And third, it was not established by a business corporation or labor union, and had a policy of refusing contributions from such entities. *MCFL*, 479 U.S. at 263-64, 107 S. Ct. 616.

II.

A.

We review *de novo* the district court's grant of the plaintiffs' motion for summary judgment. *See Smith* v. *Va. Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996) (en banc). In so reviewing the judgment, we must determine whether the prohibitions of § 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 burden the exercise of political speech. If they do, we must first decide whether the proscription on independent expenditures is narrowly tailored to serve a compelling governmental interest. *Buckley*, 424 U.S. at 44-45, 96 S. Ct. 612; *see also MCFL*, 479 U.S. at 251-52, 107 S. Ct. 616. We must next consider whether the prohibition on contributions is closely drawn to match a sufficiently important interest. *Shrink Missouri*, 528 U.S. at 387-88, 120 S. Ct. 897; *Buckley*, 424 U.S. at 24-25, 96 S.Ct. 612.

B.

1.

Any discussion of the First Amendment interests at issue in this case must begin with the Supreme Court's decision in *MCFL*. The Court took pains there to emphasize the special role that nonprofit advocacy organizations play in the political process. The Court

identified several characteristics of these groups that make them special purveyors of political speech. Far from having as their organizing purpose the aggregation of capital or the issuance of equity shares, their central energizing principle is unabashedly political and expressive. These groups, whether incorporated or not, are "formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259, 107 S. Ct. 616.[2]

As a consequence, nonprofit advocacy organizations play a distinctive role in the political scheme. Like the other participants in our political conversation, they inform and generate "[d]iscussion of public issues and debate on the qualifications of candidates," which are "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14, 96 S. Ct. 612. *See also North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000) (referring to the field of campaign politics as "an area of . . . crucial import to our representative democracy") ("*NCRL I*"). We live in a republic, where the people are sovereign. *See The Federalist No. 39*, at 190 (James Madison) (Garry Wills ed., 1982). As a consequence, "the ability of the citizenry to make informed choices among candidates for office is essential, for the

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[2] What the Court said of the nonprofit corporation at issue in *MCFL* applies with equal force to NCRL. Applying *MCFL* in *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705 (4th Cir. 1999) ("*NCRL I*"), we found that the small amount of corporate contributions NCRL received did not result in its "serving as a conduit 'for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace.' *MCFL*, 479 U.S. at 264, 107 S. Ct. 616." *NCRL I*, 168 F.3d at 714. We therefore held that "NCRL falls squarely within the *MCFL* exception." *Id.*

identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15, 96 S. Ct. 612. Through their expressive activities, groups such as MCFL and NCRL help empower citizens to make informed political choices. That is precisely why the Court has concluded that it is this kind of speech and these types of organizations that lend vitality to our political discourse.

That the functioning of these groups is vital to our democratic political process is abundantly clear from looking at the types of activities in which they engage. The Court in *MCFL* emphasized that MCFL had accepted voluntary donations from members; engaged in fundraising activities such as garage sales, bake sales, dances, raffles, and picnics; organized a public prayer service; sponsored a regional conference; provided speakers for discussion groups, debates, lectures, and media programs; sponsored an annual march; drafted and submitted legislation; sponsored testimony on proposed legislation; urged its members to contact their elected representatives to express their views on legislative proposals; and published a newsletter. 479 U.S. at 242, 107 S. Ct. 616. Similarly, NCRL engages in these same kinds of endeavors. The group is funded overwhelmingly by private contributions from individuals, and has organized such traditional fundraising activities as bake sales, walkathons, and raffles. In addition, NCRL publishes a newsletter, candidate surveys, and voter guides. It also holds conventions, provides counseling and referrals, and publicizes and promotes numerous service groups.

Taking stock of such activities reinforces the point that these organizations lie at the expressive heart of our political life. These endeavors are what attract

contributions and adherents. It is through projects such as these that groups become important symbols in political life and valuable participants in the daily ebb and flow of political discourse.

2.

All of the above activities embody participatory democracy. It follows ineluctably that restrictions on the expenditures and contributions of such organizations in federal election campaigns "operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14, 96 S. Ct. 612. The First Amendment "protect[s] our cherished right to political speech." *FEC* v. *Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997). The First Amendment also protects political association, and the regulation of contributions and expenditures implicates both of these interests. *Buckley*, 424 U.S. at 14-23, 96 S. Ct. 612. It would be foolhardy to pretend that a ban on the ability of advocacy groups to make contributions and expenditures does not impair their capacity to participate in the political process. Making expenditures and funding campaigns are essential means by which citizens in a democracy can make themselves heard.

It is revealing that, even where the Court's decisions have not addressed campaign contributions and expenditures, they have underscored the First Amendment values that may be served by them. Without the ability to expend funds, it is almost impossible for political expression in our modern society "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). *See also Mills* v. *Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) (noting

the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," including "discussions of candidates"); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). Similarly, without the expenditure of funds, "[e]ffective advocacy of both public and private points of view, particularly controversial ones," will not be significantly "enhanced by group association." *NAACP* v. *Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). *See also Kusper* v. *Pontikes*, 414 U.S. 51, 56-57, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973) (stating that "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments," and that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom"). This language from non-funding decisions does not suddenly become inoperative when contributions and independent expenditures are at issue.

It is true that there exists a differentiation in the weight the First Amendment accords to contributions and expenditures, and that an interest of the highest First Amendment order attaches to independent expenditures. The Court in *Buckley* concluded that "although [FECA's] contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations

on financial contributions." 424 U.S. at 23, 96 S. Ct. 612. *See also FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 121 S. Ct. 2351, 2356, 150 L. Ed. 2d 461 (2001) ("*Colorado II*"); *Shrink Missouri*, 528 U.S. at 386-88, 120 S. Ct. 897; *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 610, 614-15, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996) ("*Colorado I*"); *MCFL*, 479 U.S. at 259-60, 107 S. Ct. 616. At the same time, however, the Court has been careful in all of these cases not to expel financial contributions from the circle of First Amendment values. This is so for good reason. Individuals and groups that stand for ideas have a First Amendment interest in pursuing various outlets for those ideas. Independent expenditures are one such channel, and contributions are another.

Making a contribution to a candidate not only "serves as a general expression of support for the candidate and his views," but also "serves to affiliate a person with a candidate." *Buckley*, 424 U.S. at 21-22, 96 S. Ct. 612. In addition, making a contribution to a candidate "enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* Indeed, while citizens certainly can and do participate as individuals in the process of determining political change, they often do not possess the time, information, and resources to effectively influence public debate. Contributions to an advocacy group from an individual permit the individual to take advantage of the group's closer attention to political developments. And contributions from the advocacy group to a candidate in turn put the individual's donation to a more efficient and informed political effect. As the Court noted in *MCFL*:

> [I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor.

479 U.S. at 261, 107 S. Ct. 616. By making a contribution to an advocacy group, the individual citizen authorizes and empowers the organization receiving the money to serve as his or her proxy in political debate.

In sum, nonprofit advocacy organizations such as NCRL have a strong First Amendment interest in expressing their ideas and associating with others who share the same views. These entities significantly enhance the effectiveness of political expression by facilitating political association. And these groups advance both the values of political speech and association not only by making independent expenditures, but also by making contributions to candidates who share their beliefs.

3.

With these general principles in mind, it is clear that the statutory and regulatory provisions at issue in this case burden the plaintiffs' First Amendment speech and association interests. Taken together, 2 U.S.C. § 441b(a), 11 C.F.R. § 114.2(b), and 11 C.F.R. § 114.10 ban corporate contributions and expenditures in connection with federal elections, with an exception to the prohibition on corporate expenditures for certain "qualified" nonprofit corporations so narrow that NCRL does not fit into it. In view of the Court's conclusion in *Buckley* that FECA's "contribution and

expenditure *limitations* both implicate fundamental First Amendment interests," 424 U.S. at 23, 96 S. Ct. 612 (emphasis added), there is no question that a complete ban on NCRL's making contributions and expenditures burdens those very same interests.[3]

The FEC responds that, contrary to the district court's characterization, FECA and its implementing regulations do not impose a blanket prohibition. Rather, the Commission submits that the Act takes a different approach. It allows all corporations to make campaign contributions through a separate segregated fund, and corporations that do not fall within 11 C.F.R.

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[3] The FEC argues that NCRL lacks standing to challenge 11 C.F.R. § 114.10, relying on our holding in *NCRL I* that "NCRL falls squarely within the *MCFL* exception." 168 F.3d at 714. The Commission correctly observes that *NCRL I* entitles NCRL to make independent expenditures in connection with federal elections regardless of the FEC's regulation or intentions. *See supra* note 2. Thus, the Commission submits that the mere existence of a regulation that it cannot enforce against NCRL cannot cause NCRL any injury.

We are not persuaded. The FEC has made inconsistent statements throughout this litigation, and its present position is not sufficient to dispel the "credible threat of prosecution" under which NCRL operates. *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979); *Va. Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 386 (4th Cir. 2001). Though the Commission agrees that it is bound by *NCRL I*, it has not foresworn its ultimate intention to prohibit NCRL even from making independent expenditures. On the contrary, the FEC argued below that if in the future NCRL were to receive a more substantial portion of its funding from for-profit corporations, it would not qualify for the *MCFL* exception even under the holding in *NCRL I*. Because we cannot conclude that NCRL does not presently operate under the potential threat of an enforcement action, we agree with the district court that NCRL has standing to challenge 11 C.F.R. § 114.10.

§ 114.10's exception to make independent expenditures through such a fund. *See* §§ 441b(a) and (b)(2)(C). Given the availability of this alternative avenue through which to make contributions and expenditures, the FEC maintains that it is factually incorrect to contend that an absolute ban is at issue in this case.

However, the FEC's view has already been rejected by the Supreme Court in *MCFL*. While restricting MCFL's campaign spending to use of a separate segregated fund "is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts." *MCFL*, 479 U.S. at 252, 107 S. Ct. 616 (plurality opinion).[4] A segregated fund is a "political committee" under the Act. 2 U.S.C. § 431(4)(B). As a consequence, organizations that use a segregated fund must adhere to significant reporting requirements, staffing obligations, and other administrative burdens. These burdens stretch far beyond the more straightforward disclosure requirements on unincorporated associations. *See MCFL*, 479 U.S. at 252-53, 107 S. Ct.

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[4] In her concurring opinion, Justice O'Connor pointedly emphasized that "the significant burden on MCFL in this case comes . . . from the additional organizational restraints imposed upon it by the Act," as well as from the Act's "solicitation restrictions." 479 U.S. at 266, 107 S. Ct. 616 (O'Connor, J., concurring in part and concurring in the judgment). Therefore, a majority of the Court in *MCFL* rejected the argument that the FEC is presently urging upon us.

616. Asnoted in *MCFL*, 479 U.S. at 253-54, 107 S. Ct. 616, these additional burdens include:

- appointing a treasurer, § 432(a);

- forwarding contributions to the treasurer within 10 or 30 days of receiving them, depending on the amount, § 432(b)(2);

- ensuring that the treasurer keeps an account of (1) every contribution regardless of amount; (2) the name and address of anyone who makes a contribution in excess of $50; (3) all contributions received from political committees; and (4) the name and address of every person to whom a disbursement is made regardless of amount, § 432(c);

- preserving receipts for all disbursements over $200 and all records for three years, §§ 432(c) and (d);

- filing a statement of organization containing (1) its name and address; (2) the name of its custodian of records; and (3) its banks, safety deposit boxes, or other depositories, §§ 433(a) and (b);

- reporting any change in the above information within 10 days, § 433(c);

- terminating only upon filing a written statement that it will no longer receive any contributions or make any disbursements, and that it has no outstanding debts or obligations, § 433(d)(1);

- filing either (1) monthly reports with the FEC; or (2) quarterly reports during election years, a pre-election report no later than the 12th day before an

election, a post-election report within 30 days after an election, and reports every 6 months during non-election years, §§ 434(a)(4)(A) and (B);

- including in such reports information regarding (1) the amount of cash on hand; (2) the total amount of receipts in multiple categories; (3) the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, interest, or any other offset to operating expenditures in an aggregate amount above $200; (4) the total amount of all disbursements in numerous categories; (5) the names of all authorized or affiliated committees to which transfers have been made; (6) persons to whom loan repayments or refunds have been made; and (7) the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation, § 434(b); and

- soliciting contributions for its separate segregated fund only from its "members," §§ 441b(b)(4)(A) and (C), which, under *FEC v . National Right to Work Committee*, 459 U.S. 197, 203-206, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982) ("*NRWC*"), does not include persons who have merely contributed to or expressed support for the group in the past.

Many small groups may be unable to bear the substantial costs of complying with these regulations. These "more extensive requirements and more stringent restrictions . . . may create a disincentive for

such organizations to engage in political speech." *MCFL*, 479 U.S. at 254, 107 S. Ct. 616. This is because:

> Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.

Id. at 255, 107 S.Ct. 616. And Justice O'Connor emphasized in her concurring opinion that "the additional organizational restraints" imposed on "groups such as MCFL" by the Act amount to a "significant burden" on their First Amendment interests. 479 U.S. at 266, 107 S. Ct. 616 (O'Connor, J., concurring in part and concurring in the judgment).

Thus, what was true of MCFL is equally true of NCRL:

> [W]hile § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities.

MCFL, 479 U.S. at 255, 107 S. Ct. 616. The "practical effect" of § 441b(a) on NCRL "is to make engaging in protected speech a severely demanding task." *MCFL*, 479 U.S. at 256, 107 S. Ct. 616. Accordingly, we have little difficulty concluding that the prohibitions of

§ 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 burden the exercise of political speech and association.

C.

1.

Having determined that 2 U.S.C. § 441b(a) and the associated regulations burden a significant First Amendment interest in the exercise of political speech and association, we must first determine whether the prohibition on expenditures is narrowly tailored to serve a compelling governmental interest. *Buckley*, 424 U.S. at 44-45, 96 S. Ct. 612. Then we must determine whether the proscription on contributions is closely drawn to match a sufficiently important governmental interest. *Shrink Missouri*, 528 U.S. at 387-88, 120 S. Ct. 897. "The Supreme Court has regularly recognized that the prevention of real and perceived corruption in the electoral process qualifies as a compelling state interest." *Adventure Communications, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 442 (4th Cir. 1999); *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985) ("*NCPAC*"); *Shrink Missouri*, 528 U.S. at 388-89, 120 S. Ct. 897. The danger of corruption or the appearance of corruption is especially keen in the context of corporate contributions and expenditures because of the unique legal and economic characteristics of the corporate form. Corporations benefit from state laws that grant them special advantages such as limited liability, favorable treatment for asset accumulation, and perpetual life. These state-created advantages allow corporations to attract capital and deploy resources in order to maximize shareholder wealth in ways that other business forms cannot.

Corporations could use that wealth to influence federal elections. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990). Consequently, the Court has identified certain types of corruption that may warrant legislative regulation of a corporation's ability to make expenditures or contributions in connection with federal elections.

The first and most obvious type of corruption identified by the Court is quid pro quo corruption, where an officeholder takes money with the explicit understanding that he will perform certain duties for the donor in return. *See generally* Thomas Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comment. 127, 131-33 (1997). As the Court noted in *Buckley*, "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." 424 U.S. at 26, 96 S. Ct. 612. Simply put, "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497, 105 S. Ct. 1459.

Quid pro quo corruption is related to a second form of corruption, monetary influence. Corruption through monetary influence is a more subtle and hence more pervasive form of corruption than the quid pro quo, one in which officeholders consider monetary influences when performing their public duties. Monetary influence need not involve an explicit deal between a donor and an officeholder. Burke, *supra*, at 131-33. The corrupting effect of monetary influences has been clarified in the case law as the concern over the power of corporations to utilize the special advantages of the

corporate form to create political "war chests" which could be used to incur political debts. *NRWC*, 459 U.S. at 207-08, 103 S. Ct. 552. The concern here has to do with permitting corporations to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257, 107 S. Ct. 616. Accordingly, the Court has recognized as compelling the governmental interest in preventing corruption, which supports restricting the influence of political "war chests" funneled through the corporate form. *NRWC*, 459 U.S. at 207-08, 103 S. Ct. 552; *see also MCFL*, 479 U.S. at 257, 107 S. Ct. 616.

Third, the possibility of distortion of political support for corporate causes has been recognized as a form of corruption significant enough to warrant government regulation. Burke, *supra*, at 133-135. Distortion involves the concern that "[t]he resources in the treasury of a business corporation . . . . are not an indication of popular support for the corporation's political ideas." *MCFL*, 479 U.S. at 258, 107 S. Ct. 616. Instead, these resources may reflect only "the economically motivated decisions of investors and customers." *Id.* The fear here is that shareholders or members of certain corporations will have an "economic disincentive for disassociating with [the corporation] if they disagree with its political activity." *Id.* at 264, 107 S. Ct. 616; *see also Austin*, 494 U.S. at 663, 110 S. Ct. 1391. Accordingly, the potential for distortion is also a compelling governmental interest for limiting political expression. *MCFL*, 479 U.S. at 263-64, 107 S. Ct. 616; *Austin*, 494 U.S. at 663, 110 S. Ct. 1391.

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Nevertheless, the Supreme Court has also made it clear that the "[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes." *MCFL*, 479 U.S. at 259, 107 S. Ct. 616. This potential presents a real danger when for-profit corporations are involved. However, such a danger is not present when the corporation at issue is a nonprofit advocacy corporation.

To begin with, when independent expenditures are considered, the potential for corruption, whether it be quid pro quo, monetary influence, or distortion, is "substantially diminished." *Buckley*, 424 U.S. at 47, 96 S. Ct. 612. Hence, the Supreme Court has crafted an exception to the expenditure prohibition contained in 2 U.S.C. § 441b(a) for nonprofit advocacy corporations. This is the so-called *MCFL* exception. This court has already held that NCRL is entitled to the *MCFL* exception. *NCRL I*, 168 F.3d at 714.

In *NCRL I*, we determined that "the list of nonprofit corporate characteristics in *MCFL* was not 'a constitutional test for when a nonprofit must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*.'" 168 F.3d at 714 (quoting *Day v. Holahan*, 34 F.3d 1356, 1363 (8th Cir. 1994)). After examining the factors identified in *MCFL*, we were persuaded that NCRL was entitled to the *MCFL* exception. *Id.* When applying *MCFL*, we noted that "NCRL displays all the typical characteristics of the non-profit form—it does not engage in profit-making activity, it has no shareholders or other persons who might have [a claim] on its assets and earnings, and it is exempt from federal income taxation." *Id.* Unlike

MCFL, NCRL did not have a policy against accepting corporate donations. However, NCRL was funded overwhelmingly by private, individual donations. While NCRL had accepted some corporate donations in the past, these donations made up only between zero and eight percent of NCRL's total revenues. *Id.* We concluded that "this modest percentage of revenue" did not disqualify NCRL for the *MCFL* exemption. *Id.* In addition, many of those corporate contributions were not of the traditional form because they were "part of a program by which phone company customers may direct their phone bill refunds to a nonprofit of their choice." *Id.* Therefore, we held that "NCRL falls squarely within the *MCFL* exception." *Id.*

Because NCRL has not changed in any relevant way since our decision in *NCRL I*, NCRL does not "serv[e] as [a] conduit[ ] for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264, 107 S. Ct. 616. This constitutionally entitles NCRL to an exemption from the provisions banning independent expenditures in § 441b(a) and 11 C.F.R. § 114.2(b). And because the exception in 11 C.F.R. § 114.10 constitutes merely a rigid codification of the factors in *MCFL*, it is also unconstitutional as applied to NCRL.

3.

While the FEC recognizes that our decision in *NCRL I* controls the outcome of this case insofar as independent expenditures are concerned, it contends that we must consider contributions separately and hold the contribution portion of the statute and regulations constitutional as applied to NCRL. The Supreme Court has not addressed whether the risk of corruption from

direct contributions is present when the contributors are nonprofit advocacy corporations who neither have shareholders nor investing members, and accept the overwhelming share of their donations from private individuals. We do not believe that it is.

Viewing every direct campaign contribution from a nonprofit advocacy corporation to be corrupting would be devastating to the proper functioning of the political process. The argument that only an absolute ban on nonprofit contributions can serve the important public interest in preventing corruption simply proves too much. If this were true, contributions would also have to be banned in every situation where contributing individuals or unincorporated associations bore a strong commitment to an issue or candidate. Instead, limits, not total bans, have been adopted for individuals and unincorporated advocacy groups.

NCRL is more akin to an individual or an unincorporated advocacy group than a for-profit corporation. Neither individuals nor unincorporated advocacy groups pose so great a risk of quid pro quo or monetary influence corruption that a ban on contributions is required. Similarly, nonprofit advocacy corporations do not avail themselves of the state-conferred advantages associated with the corporate form, which is the rationale for regulating corporate activity in the first place. *See, e.g., Austin*, 494 U.S. at 658-59, 110 S. Ct. 1391. Advocacy groups rely on donations to fund a variety of projects, none of which involve making a profit in the capital markets. It is simply implausible to argue that a small nonprofit accepting individual contributions from like-minded donors poses the same risk to our political order as a Fortune 500 company.

However, the FEC argues that by virtue of taking the corporate form, NCRL now poses those risks. But *MCFL* requires a different conclusion. The Court emphasized that taking the corporate form does not, by itself, transform an otherwise benign group into one that poses an inherent risk of corruption. As noted earlier, NCRL, like MCFL, "was formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259, 107 S. Ct. 616. Thus, NCRL does not utilize the advantages states confer on corporations that enable them to amass capital. The advantages NCRL derives from taking on the corporate form are those "that redound to its benefit as a political organization, not as a profit-making enterprise." *Id.*

NCRL also poses no threat of distortion of political support because the very reason people join and contribute to NCRL is that their views are aligned with those of the organization. NCRL's members have no underlying economic incentive to join the group, making NCRL distinctly different from for-profit corporations and many non-profits as well. *See, e.g., Austin*, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652. There is simply no danger that a nonprofit advocacy group's cause will bear no relation to the beliefs of its contributors and members because the group's *raison d'etre* is to amplify and publicize those beliefs. Nor is there the danger that an individual donor would feel alienated because his views are diametrically opposed to those of the organization. In fact, as the Court recognized in *MCFL*, individuals contribute to political organizations "precisely because they support those purposes," and because they believe that contribution is a "more effective means of advocacy" than spending the money on their own. 479 U.S. at 260-61, 107 S. Ct. 616.

Thus, allowing NCRL to make limited contributions creates no credible threat of distortion to the political process.

To be sure, it would be administratively more convenient if all direct contributions to candidates were prohibited. After all, a bright-line rule would be easier to administer and would tend to avoid litigation. It could likewise be said, of course, that convenience would be served if all corporate independent expenditures were prohibited. But the Court in *MCFL* flatly refused to credit administrative convenience as an adequate basis for such a blanket rule, stating that "the desire for a bright-line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." 479 U.S. at 263, 107 S. Ct. 616. Although administrative convenience constitutes a legitimate state interest where rational basis scrutiny of regulatory enactments is involved, such convenience is insufficient to justify state action that triggers any level of heightened scrutiny. *See, e.g., Craig v. Boren*, 429 U.S. 190, 198, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (citing decisions that "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications"). And while the Court has differentiated the level of scrutiny applied to expenditure restrictions and contribution restrictions, *see Shrink Missouri*, 528 U.S. at 386-88, 120 S. Ct. 897, we do not understand it to have relegated the latter to a mere matter of rational basis review. The Court has recently stated that "a contribution limit involving 'significant interference' with associational rights . . . [can] survive if the Government demonstrate[s] that contribution regulation [is] 'closely drawn' to match a 'sufficiently

important interest.'" *Shrink Missouri*, 528 U.S. at 387-88, 120 S. Ct. 897 (quoting *Buckley*, 424 U.S. at 25, 96 S. Ct. 612). This formulation requires something more exacting than rational basis review. As a result, a rationale of administrative convenience cannot successfully be advanced to sustain § 441b(a) and the FEC's sweeping regulatory ban at issue in this case.

Organizations that in substance pose no risk of "unfair deployment of wealth for political purposes" may not be banned from participating in political activity simply because they have taken on the corporate form. *MCFL*, 479 U.S. at 259, 107 S. Ct. 616. The rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions. In neither case is there the threat of quid pro quo, monetary influence, or distortion corruption that the prohibitions seek to prevent. We cannot sustain a measure that drains lifeforce from democracy when that measure does not reflect the public interest that would warrant such a drastic step. A corporation that qualifies for an *MCFL* exception poses no special threat to the political process. *See MCFL*, 479 U.S. at 263, 107 S. Ct. 616 ("It is not the case . . . that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all."). As a consequence, neither NCRL's expenditures nor its contributions may be prohibited under the First Amendment.

4.

In making this determination, we seek only to respect the Supreme Court's basic pronouncement in *MCFL* on the role that nonprofit advocacy groups play in our political life. We do not think that other decisions undermine the Supreme Court's commitment to the expressive and associational values that these organizations promote. In *Austin*, the Supreme Court held that a state statute banning direct contributions could be applied to the Michigan State Chamber of Commerce, a nonprofit corporation. 494 U.S. at 654-55, 110 S. Ct. 1391. Although *Austin* did uphold a state ban on contributions as applied to the Chamber, the Court noted that the Chamber was established for many varied purposes and was not inherently a political advocacy group like MCFL. *Id.* at 661-65, 110 S. Ct. 1391. In fact, the Chamber's educational goals were "not expressly tied to political goals," and many of the Chamber's members, much like shareholders in a for-profit corporation, might be reluctant to withdraw their membership if they did not agree with the Chamber's political expression. *Id.* at 662-63, 110 S. Ct. 1391. The *Austin* Court also noted that the Chamber had for-profit members and did not exhibit the characteristics identified in *MCFL* that would require the state to grant an exemption. In contrast, we have earlier held that NCRL exhibits the precise characteristics identified in *MCFL* and is entitled to the *MCFL* exception. *NCRL I*, 168 F.3d at 714.

Similarly, we are not persuaded that the Court's decision in *NRWC* requires the sweeping holding that an absolute ban on nonprofit contributions is constitutional. In *NRWC*, the Court had to determine whether National Right to Work Committee ("NRWC"),

a nonprofit corporation, had violated 2 U.S.C. § 441b(b)(4)(C) by using its general funds to solicit contributions for its separate segregated political fund from persons who were not its "members." 459 U.S. at 198-99, 103 S. Ct. 552. The issues in *NRWC* were whether NRWC's mailing had been sent to persons who did not fall within the statutory definition of "member," and, if so, whether the restriction on soliciting only "members" was constitutional. *Id.* at 198, 200-01, 206-11, 103 S. Ct. 552. The *NRWC* Court did not decide the constitutionality of the corporate ban provision as applied to *MCFL*-type corporations. However, that is precisely the question that confronts us today.

The District of Columbia Circuit took the approach that we now adopt in determining whether the FEC could successfully bring a civil enforcement action against the National Rifle Association ("NRA") for allegedly impermissible contributions and expenditures made during different years. *FEC v. National Rifle Ass'n.*, 254 F.3d 173 (D.C. Cir. 2001). That court expressed the view that corporate ban provisions are valid only insofar as they prevent certain threats to the political process. *Id.* at 191-92. It held that corporations which do not pose such threats may not be subject to § 441b(a)'s restrictions regardless of whether the restriction is on expenditures or contributions. The D.C. Circuit noted, "As we read *MCFL* and *Austin*, the [FEC] must demonstrate that the NRA's political activities threaten to distort the electoral process through the use of resources that, as *MCFL* put it, reflect the organization's 'success in the economic marketplace' rather than the 'power of its ideas.'" *Id.* at 191 (quoting *MCFL*, 479 U.S. at 258-59, 107 S. Ct. 616). Since the FEC could not meet this burden with

respect to one of the years at issue, § 441b(a) could not constitutionally be applied to the NRA's contributions and expenditures during that year. *Id.* at 192-93.

5.

Finally, the FEC has failed to meet its other burden in this case. In addition to showing that a sufficiently important governmental interest justifies the prohibition on contributions in the statute and regulations, the FEC was required to prove that the provisions are closely drawn to match it. *Shrink Missouri*, 528 U.S. at 387-88, 120 S. Ct. 897. In *Buckley*, the Court held that a $1,000 *limit* on contributions to candidates for federal elective office by an individual or a group was constitutional because "the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues." 424 U.S. at 28-29, 96 S. Ct. 612. Yet, when a limit becomes a ban, the burden of demonstrating that the regulation is closely drawn becomes that much more difficult. This is especially the case when that ban, combined with the costs and burdens associated with forming a separate segregated fund, could effectively cripple small, nonprofit advocacy groups that may have few or no ties to the world inhabited by for-profit corporations.

As noted earlier, it is possible to respect the congressional interest in minimizing corruption and to simultaneously doubt that an all-out ban on contributions by nonprofit advocacy corporations is necessary to prevent this potential abuse. The government has not met its burden of showing that § 441b(a) is closely drawn as applied to nonprofit advocacy corporations when other means, such as contribution limits, are fully

available to address the important public interest in honest elections.

It is, of course, the task of Congress, not the courts, to set limits on campaign contributions. Such contribution limits for individuals, corporations, and political committees have withstood numerous constitutional challenges. *See Buckley*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659; *California Med. Ass'n v. FEC*, 453 U.S. 182, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981) (allowing limits on contributions to political committees). Such contribution limits reduce the risk that either individuals or for-profit corporations can circumvent FECA and § 441b(a) by establishing and utilizing nonprofit advocacy groups to funnel money that could not otherwise be placed into the pockets of political candidates. The utilization of an absolute ban on advocacy group contributions becomes especially suspect when more closely drawn and widely utilized means, such as contribution limits, exist to address the asserted problem.

In sum, the issue is whether political associations that are incorporated, but present no risk whatever to the political process, *see MCFL*, 479 U.S. at 263, 107 S. Ct. 616, may be altogether prohibited from making contributions or expenditures out of their general treasuries simply by virtue of their corporate status. The district court correctly found "the distinction between contributions and expenditures to be immaterial in this case." *Beaumont v. FEC*, 137 F. Supp. 2d 648, 657 (E.D.N.C. 2000). The issue is whether the FEC has demonstrated a sufficient interest "in *prohibiting* even limited contributions by *all* corporations, even those that 'do[ ] not pose such a threat.'" *Id.* (quoting *MCFL*, 479 U.S. at 263, 107 S. Ct. 616). Because we find that the FEC has not met this burden, we hold that the

absolute ban on contributions and expenditures in § 441b(a) and its implementing regulations cannot constitutionally be applied to NCRL. If we held otherwise, we believe we would be effectively eviscerating the political role of nonprofit advocacy groups highlighted by the Supreme Court in *MCFL*.

III.

The plaintiffs ask us to go beyond the district court's decision that § 441b(a) and its implementing regulations are unconstitutional as applied to NCRL, and hold these provisions facially unconstitutional. This step would fly in the face of Supreme Court precedent, and we decline to take it.

A ruling of facial invalidity based on overbreadth "is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). *See also Bd. of Trs. of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 484-85, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989); *Colorado I*, 518 U.S. at 623-24, 116 S. Ct. 2309. Thus, rulings of facial invalidity are distinctly disfavored as a brusque intrusion on the legislative branch and a real breach of the separation of powers. A court properly holds a statute facially invalid only where "the over-breadth [is] substantial . . ., judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S. Ct. 2908.

Applying this test, we agree with the district court's conclusion that § 441b(a) is not facially overbroad. Despite the list of nonprofit, tax-exempt corporations that the plaintiffs compiled in support of its overbreadth claim, the district court properly found that

they had failed as an empirical matter "to demonstrate that the constitutional infringements caused by [§ 441b(a)] and the related regulations are 'substantial' in relation to their 'plainly legitimate sweep.'" First, the plaintiffs fail to distinguish between those nonprofit corporations that are exempt and those that are not. And the Court held in *Austin* that an almost identical state statute may be properly applied to some nonprofit corporations. *See* 494 U.S. at 661-65, 110 S. Ct. 1391.

Second, even if we were to assume that every one of the corporations on the plaintiffs' list are entitled to an exemption, no calculations are necessary to conclude that hundreds or even thousands of constitutionally protected advocacy groups pale in comparison to the infinitely larger number of for-profit corporations that exist in this country. And the plaintiffs do not suggest that § 441b(a) and the regulations are unconstitutional with respect to for-profit corporations, not to mention the many labor organizations and national banks to which the provisions also apply. Indeed, the Supreme Court and other courts have upheld § 441b(a)'s validity in routine applications. *See, e.g., NRWC*, 459 U.S. at 207-211, 103 S. Ct. 552; *Nat'l Rifle Ass'n*, 254 F.3d at 191-92 (upholding application of § 441b(a) for certain years); *Mariani* v. *United States*, 212 F.3d 761, 773 (3d Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1010, 121 S. Ct. 564, 148 L. Ed. 2d 484 (2000). In short, the plaintiffs cannot establish substantial overbreadth in this case.

A further fatal flaw in the plaintiffs' overbreadth position is that the Supreme Court has rejected it. In *Austin*, the Court held that a state statute, modeled on § 441b(a) and almost identical to it, was "not substantially overbroad." 494 U.S. at 661, 110 S. Ct. 1391.

The Court then went on to apply the *MCFL* exception, which was not contained in the statute, to determine whether the statute was constitutional as applied. *Id.* at 661-65, 110 S. Ct. 1391. Thus, the plaintiffs' argument that § 441b(a) is facially invalid because its text does not contain an *MCFL* exception fails in view of the Court's own refusal in *Austin* to declare an almost identical state statute facially invalid for the same reason. The Supreme Court has consistently endorsed as-applied rulings in reviewing the constitutionality of FECA and analogous state statutes. *See Colorado II*, 533 U.S. 431, 121 S. Ct. 2351, 150 L. Ed. 2d 461; *Colorado I*, 518 U.S. at 613-14, 623-26, 116 S. Ct. 2309; *Austin*, 494 U.S. at 661-65, 110 S. Ct. 1391; *MCFL*, 479 U.S. at 263-64, 107 S. Ct. 616; *Buckley*, 424 U.S. at 68-74, 96 S. Ct. 612. Indeed, *MCFL* explicitly anticipated the possibility that only a "small" group of corporations would be exempt from § 441b(a)'s prohibitions on independent expenditures. 479 U.S. at 264, 107 S. Ct. 616.

Finally, Congress included a severability clause in FECA that provides for retaining as much of the statute as possible where it is found invalid in particular applications. Specifically, the clause states that "[i]f any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby." 2 U.S.C. § 454. Congress has made its intent clear. And after applying conventional overbreadth doctrine in this case, we see no reason to frustrate it.

For all of these reasons, we hold that § 441b(a) and the associated regulations are not facially overbroad. Whatever overbreadth exists "should be cured through

case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16, 93 S. Ct. 2908. If every partial constitutional shortcoming in a statute mandated its wholesale demise, the courts would assume for themselves more fearsome powers than our Constitution posits.

IV.

This court would not lightly conclude that any federal statute was unconstitutional in any of its applications. We also view seriously the interest in keeping American elections rigorously honest, as well as expressively robust. However, it is important to consider in perspective the sweeping nature of the position that the FEC is urging us to take. The Commission asks us to hold that an absolute ban on every direct contribution by every nonprofit advocacy corporation in America is altogether legitimate. No matter how small the organization, no matter how modest the contribution, and no matter how absent the threat the group poses to the political process, the FEC argues that the contribution can be prohibited.

This position overlooks the difference between for-profit corporations and nonprofit advocacy groups funded overwhelmingly by individual donors who simply happen to believe in their ideas. An advocacy group, the Supreme Court has noted, does not "merely pose[ ] less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all." *MCFL*, 479 U.S. at 263, 107 S. Ct. 616. Yet the FEC would require that the full panoply of regulatory requirements be imposed upon nonprofit corporations before they can begin to participate in the political

process in what the Supreme Court has emphasized is a meaningful and important way. *See* 2 U.S.C. §§ 432, 433, 434, and 441b(b)(4)(A) and (C). Viewed in this light, the step we take is a cautious and modest one. It is only the consequences of failing to take it that would loom immeasurably large for the vitality of the democratic system of government that the First Amendment is intended to protect.

In its order of judgment of January 24, 2001, the district court declared that 2 U.S.C. § 441b and 11 C.F.R. §§ 114.2(b) and 114.10 were unconstitutional as applied to NCRL, a non-profit, *MCFL*-type corporation. The court therefore permanently enjoined the FEC from prosecuting the plaintiffs for violations of § 441b and 11 C.F.R. §§ 114.2(b) and 114.10. For the foregoing reasons, its judgment is

AFFIRMED.

WIDENER, Circuit Judge, concurring and dissenting.

I concur in the result of affirmance and in all of the opinion of Judge Wilkinson, with the exception of Part III.

As to part III, I am of opinion we should decline to consider the broader question of whether 2 U.S.C. § 441b(a) and its implementing regulations are facially unconstitutional, that being unnecessary to an affirmance. I would follow Rule 2 of *Ashwander*: "The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. . . . It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander* v. *TVA*, 297 U.S. 288,

341, 346-347, 56 S. Ct. 466, 80 L. Ed. 688 (1935) (Justice Brandeis concurring, internal quotations and citations omitted).

GREGORY, Circuit Judge, concurring in part and dissenting in part.

I concur in Parts II.C.1 and II.C.2 of the court's opinion. I agree that, insofar as independent expenditures are concerned, this case is controlled by *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000). I also concur in Part III of the Court's opinion; § 441b(a) is not substantially overbroad. I respectfully dissent, however, from Parts II.C.3 through II.C.5. That portion of the opinion, which holds that NCRL must be given an *MCFL*-type exemption for its campaign contributions, is inconsistent with *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982) ("*NRWC*"). I would join the Sixth Circuit in upholding § 441b(a)'s ban on contributions by non-profit ideological corporations such as NCRL. *Kentucky Right To Life, Inc.* v. *Terry*, 108 F.3d 637 (6th Cir. 1997).

I see no way to avoid the import of the Supreme Court's analysis in *NRWC*. *See also FEC* v. *Nat'l Conservative PAC*, 470 U.S. 480, 495, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985) (noting that *NRWC* upheld "the prohibition of corporate campaign contributions"). The majority relies almost exclusively on *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) ("*MCFL*"), to reach its result. In doing so, however, the majority turns a blind eye not only to *NRWC*, but to the extended discussion of *NRWC* contained in both the *MCFL* majority and

dissenting opinions. This subsequent endorsement of the holding of *NRWC*, adhered to by every Member of the Court, confirms the validity of § 441b(a)'s ban on corporate contributions, even as applied to non-profit corporations such as NCRL.

In *NRWC*, the Supreme Court addressed § 441b's regulation of corporate campaign contributions as applied to non-profit corporations. Specifically, the Court considered the scope of the exemption contained in § 441b(b)(2)(C) and §§ 441b(b)(4)(A) and (C) to § 441b(a)'s ban on corporate contributions and expenditures. 459 U.S. at 207-11, 103 S. Ct. 552. Section 441b(b)(2)(C) exempts "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation. . . ." Sections 441b(b)(4)(A) and (C) further define the scope of the exemption by limiting "solicitation of contributions" by corporations without capital stock to its "members." The issue in *NRWC* was whether the corporation had "limited its solicitation of funds to 'members'," but that specific question was "but the tip of the statutory iceberg" because the solicitation of funds was part of an exemption from the general rule prohibiting corporate contributions. *Id.* at 198, n.1, 103 S. Ct. 552.

The Court found two purposes sufficient to justify § 441b's "prohibitions and exceptions." The first purpose was "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributors." *Id.* at 207, 103 S. Ct. 588. The second purpose was "to protect the individuals who

have paid money into a corporation . . . for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Id.* at 208, 103 S. Ct. 588.

NRWC was a non-profit corporation similar to MCFL and NRCL, funded by solicitations that "would neither corrupt officials nor coerce members of the corporation holding minority political views. . . ." 459 U.S. at 207, 103 S. Ct. 552. The definition NRWC sought for the term "members" would only include persons who were "philosophically compatible" with the corporation. *Id.* at 206, 210, 103 S. Ct. 552; *see also MCFL*, 479 U.S. at 269, 107 S. Ct. 616 (Rehnquist, C.J., dissenting). But the Court "declined the invitation to modify the statute to account for the characteristics of different corporations," *MCFL*, 479 U.S. at 269, 107 S. Ct. 616, finding that § 441b was "sufficiently tailored" to "avoid undue restriction" on NRWC's First Amendment rights:

> In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress's judgment that it is the potential for such influence that demands regulation. Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared. As we said in *California Medical Association* v. *FEC*, 453 U.S. 182, 201, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981), the

> "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process."

NRWC, 459 U.S. at 209, 103 S. Ct. 552 (citations omitted). Repeating the acknowledged interests in preventing corruption and the appearance of corruption, the Court concluded that "there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals." *Id.* at 208, 210, 103 S. Ct. 552; *Buckley* v. *Valeo*, 424 U.S. 1, 26-27, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788, n. 26, 98 S.Ct. 1407, 55 L. Ed. 2d 707 (1978).

I understand the majority's point that *NRWC* dealt with the definition of "members" for § 441b segregated fund solicitations purposes, but the *NRWC* Court's discussion of the exception cannot be so easily divorced from its discussion of the general rule. In considering the scope of the exception to § 441b's prohibition, the Court also considered the prohibition itself. Indeed, the Court's analysis of the exception was largely determined by the need to give broad prophylactic effect to the ban on corporate contributions.

The majority rejects *NRWC* in favor of *MCFL*, arguing that the Constitution ought to view § 441b's ban on contributions the same as it views the ban on expenditures. The respective discussions in both the majority and dissenting opinions in *MCFL* demonstrate that the Supreme Court struggled with this very question. Chief Justice Rehnquist, writing in dissent in *MCFL*, and joined by three other Justices, took the view that there was no constitutional difference between contributions and independent expenditures in

the context of § 441b. 479 U.S. at 270, 107 S. Ct. 616. According to the Chief Justice's view, *NRWC* required a finding of constitutionality in *MCFL*. See *MCFL*, 479 U.S. at 269, 107 S. Ct. 616 ("I would have thought the distinctions drawn by the Court today largely foreclosed by our decision in *NRWC*."). Justice Brennan, writing for a majority of the Court, thought otherwise, specifically distinguishing *NRWC* by noting that *NRWC* involved direct contributions to candidates:

> *[T]he political activity at issue in that case was contributions* . . . . (citations omitted.) We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. (citations omitted.) In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money *for direct contributions to candidates*. The limitation on solicitation in this case, however, means that nonmember corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. Regulation that would produce such a result demands far more precision than § 441b provides. Therefore, the desirability of a broad prophylactic rule cannot justify treating alike business corporations and [MCFL] in the regulation of independent spending.

MCFL, 479 U.S. at 260, 107 S. Ct. 616 (emphasis added).

If *MCFL* had not mentioned *NRWC*, I might question its continuing vitality. The amount of deference shown to legislative judgment certainly differs between *NRWC* and *MCFL*. *Compare NRWC*, 459 U.S. at 210, 103 S. Ct. 552 ("[W]e accept Congress's judgment that it is the potential for such influence that demands regulation."), *with MCFL*, 479 U.S. at 260, 107 S. Ct. 616 ("Regulation that would produce such a result demands far more precision than § 441b provides."). Or if the Court in *MCFL* had distinguished *NRWC* in the way the majority does here, instead of going out of its way to confirm *NRWC* as applied to corporate contributions, I might be persuaded by the majority in this case. But the Court took neither of those two options, instead expressly reaffirming *NRWC*, and explaining it as a contributions case. After considering this caselaw, I cannot escape the conclusion that *NRWC* is dispositive with respect to § 441b's ban on corporate contributions. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA, NORTHERN DIVISION

No. 2:00-CV-2-BO-2

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT, PRESIDENT OF NORTH CAROLINA RIGHT TO LIFE, INC., AND NORTH CAROLINA RIGHT TO LIFE, INC., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

Oct. 3, 2000

ORDER

TERRENCE WILLIAM BOYLE, Chief Judge.

This matter is before the Court on the Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Partial Dismissal and for Partial Summary Judgment. In the underlying action, Plaintiffs challenge 2 U.S.C. § 441b(a) (banning corporate contributions and expenditures in connection with federal elections), 11 C.F.R. § 114.2(b) (prohibiting all corporate contributions to federal candidates and all expenditures made by non-"qualifying" corporations), and 11 C.F.R. § 114.10 (making a narrow exception to the ban on

corporate expenditures for certain "qualified" non-profit corporations).

Plaintiffs seek both declaratory and injunctive relief with respect to the challenged provisions and have moved for Summary Judgment. Defendant, Federal Election Commission (the "Commission" or "FEC"), has moved for Partial Summary Judgment and Partial Dismissal in response to Plaintiffs' Motions. For the reasons discussed below, the challenged provisions violate NCRL's First Amendment rights without a compelling interest. Plaintiffs' Motion for Summary Judgment will be granted and Defendant's Motion for Partial Summary Judgment and Partial Dismissal will be denied. The extent of the declaratory relief to be given has yet to be determined by the Court. The effect of this ruling is stayed until the Parties submit Memoranda on this issue as directed in the Conclusion to this Order.

BACKGROUND

Plaintiff North Carolina Right to Life, Inc. ("NCRL") is a non-profit corporation, exempt from federal taxation under § 501(c)(4) of the Internal Revenue Code. NCRL engages in various charitable practices, which include providing crisis pregnancy counseling, publishing crisis pregnancy literature and promoting alternatives to abortion. Verified Complaint at ¶ 13. NCRL has no shareholders, nor does any part of its net earnings inure to the benefit of any individual. Verified Complaint at ¶¶ 11, 14. Plaintiff Christine Beaumont is an eligible voter in North Carolina, Plaintiff Loretta Thompson is Vice President of NCRL, Plaintiff Stacy Thompson is a member of the Board of Directors of NCRL, and Plaintiff Barbara Holt is President of NCRL. Verified Complaint at ¶¶ 4-7.

Defendant, Federal Election Commission, is the independent federal agency with exclusive jurisdiction over the administration, interpretation and civil enforcement of the Federal Election Campaign Act (the "Act"). 2 U.S.C. 437g(a)(5), 437g(c).

Plaintiffs commenced this action on January 3, 2000, by filing a complaint seeking declaratory and injunctive relief. Plaintiffs challenge the constitutionality of prohibitions on corporate independent expenditures and contributions in connection with political activity contained in the Federal Election Campaign Act and regulations promulgated thereunder.

Plaintiffs argue that: (1) 2 U.S.C. § 441b(a) and 11 C.F.R. 114.10 prohibit NCRL from making independent expenditures in connection with federal elections in violation of their First Amendment freedoms of expression and association; and (2) 2 U.S.C. § 441b and 11 C.F.R. § 114.10 ban contributions by all corporations, including NCRL, and thus infringe NCRL's First Amendment rights. Plaintiffs seek declaratory and injunctive relief in connection with these grievances.

This Court held a hearing on this matter on September 18, 2000. Parties' motions are ripe for ruling.

DISCUSSION

I. Motions for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). To avoid summary judgment, the opposing party must

introduce evidence to create an issue of material fact on "an element essential to the party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

II. Legal Framework

The importance of campaign contributions and expenditures as political speech is beyond question. Such speech is central to the "unfettered interchange of ideas" in the political sphere. *Roth* v. *United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). As a result, limitations on political contributions and expenditures "operate in an area of the most fundamental First Amendment activities," *Buckley* v. *Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), implicating the closely-guarded freedoms of expression and association.

The Supreme Court has upheld these freedoms in the context of organizational speech. In *Buckley*, the Court stated that "[g]roup association is protected because it enhances 'effective advocacy.'" *Buckley*, 424 U.S. at 65, 96 S. Ct. 612. Importantly, individuals contribute to organizations "because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 261, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) (hereinafter "*MCFL*").

The First Amendment freedoms of *corporations* are not absolute. Stemming from a "concern over the corrosive influence of concentrated corporate wealth," *id.* at 257, 107 S. Ct. 616, the Federal Election Campaign Act significantly restricts corporate activity in

the political realm. The Act is part of a "history of regulation of corporate political activity" that has sought to prevent corporate "'political war chests'" from hampering the integrity of the marketplace of political ideas. *Id.* at 257, 107 S. Ct. 616. Recognizing such threats, "the Supreme Court has, in some circumstances, upheld complete prohibitions on both corporate political contributions . . . and independent expenditures." *North Carolina Right to Life* v. *Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000) (hereinafter "*NCRL I*").

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986), the Supreme Court held that the state interest in regulating corporate political activity must be weighed against corporations' valid First Amendment freedoms. The regulation of corporate political speech reflects a concern "not about the corporate form per se, but about the potential for unfair deployment of wealth for political purposes," *MCFL*, at 259, 107 S. Ct. 616. The Supreme Court determined that the 2 U.S.C. § 441b ban on corporate independent expenditures could not constitutionally be applied to MCFL, a non-profit, non-stock corporation with an ideological purpose. *Id.* at 252, 107 S. Ct. 616.

The Court reasoned that certain non-profit, ideological corporations pose no threat to the political marketplace. *See MCFL*, at 263, 107 S. Ct. 616 ("It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all.") The Court concluded that "the concerns underlying the regulation of corporate political activity are simply absent with

respect to" such ideological, non-profit corporations. *Id.* at 263, 107 S. Ct. 616. They held that "§ 441b's restriction of independent spending . . . infringes protected speech without a compelling justification for such infringement." *Id.* at 263, 107 S. Ct. 616.

The Court set forth three characteristics "essential" to MCFL's exemption: (1) it was formed for the express purpose of promoting political ideas and cannot engage in business activities; (2) it had no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and (3) it was not established by a business corporation or a labor union and had a policy not to accept contributions from such entities. *MCFL*, at 264, 107 S. Ct. 616.

In *NCRL I*, the Fourth Circuit determined that the list of characteristics in *MCFL* "was not 'a constitutional test for when a nonprofit must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*,'" *NCRL*, at 714 (quoting *Day* v. *Holahan*, 34 F.3d 1356, 1363 (8th Cir. 1994)). With that established, the Circuit Court considered whether the same organization in this case, NCRL, belonged in the category of corporations that "does not pose . . . a threat" to the political marketplace. *MCFL*, at 263, 107 S. Ct. 616.

NCRL would have failed to qualify as an *MCFL*-exempt corporation under a strict application from that case, because it accepted an insignificant amount of corporate contributions. The Court held that the "crucial question is not whether NCRL has a policy against accepting corporate contributions, but whether . . . it is serving as a conduit for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace." *NCRL I*, at 714.

Finding that corporate contributions made to NCRL were "not of the traditional form" and, moreover, that NCRL "display[ed] all the typical characteristics of the nonprofit form," the Circuit Court determined that NCRL "falls squarely within the MCFL exception." *Id.*, at 714.

The Circuit Court then held that the North Carolina statutes "fail[ed] 'to distinguish between corporations which pose a threat to the integrity of the political process and those which do not.'" *Id.*, at 714. Lacking such an important distinction, the statutes infringed First Amendment freedoms without a compelling state interest and were therefore declared "unconstitutionally overbroad." *Id.*, at 714.

NCRL now asks this Court to examine similar issues in the federal context. The federal statute and regulations, on their face, constitute an absolute bar to NCRL making contributions to or independent expenditures on behalf of a candidate for federal office. Such a burden on NCRL's First Amendment rights may be upheld only upon a showing that it is narrowly-tailored to further a compelling governmental interest. *Buckley* v. *Valeo*, 424 U.S. 1, 44-45, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

III. 2 U.S.C. § 441b(a) Ban on Corporate Expenditures

Plaintiffs first challenge the 2 U.S.C. § 441b(a) ban on corporate expenditures. 2 U.S.C. § 441b(a) makes it "unlawful for any . . . corporation to make a[n] . . . expenditure in connection with any election to any political office." 2 U.S.C. § 441b(a) fails to distinguish between innocuous corporations, such as NCRL, and corporations that, as "political war chests," pose a real

and perceived threat to the political process. Instead, it prohibits "any corporation" from making independent expenditures in connection with elections.

As discussed above, the Supreme Court held this statute unconstitutional as applied to Massachusetts Citizens for Life, a non-profit, ideological corporation similar to NCRL. MCFL was deemed "more akin to [a] voluntary political association[ ] than [a] business firm[ ]," *MCFL*, at 263, 107 S. Ct. 616. Given that MCFL posed no threat to the political marketplace, the Court found that 2 U.S.C. § 441b(a) prohibited MCFL from making independent expenditures "without a compelling justification for such infringement." *MCFL* at 263, 107 S. Ct. 616.

In *NCRL I*, the Fourth Circuit held that a similar ban on corporate independent expenditures was unconstitutional. The Court determined that NCRL qualifies as an MCFL-type corporation, for which the interest in regulating political activity is not compelling. *NCRL I*, at 714 ("NCRL falls squarely within the MCFL exception."). The FEC states that "the [*NCRL I*] opinion is clear and controlling as to NCRL's entitlement to a constitutional exemption from 2 U.S.C. 441b's prohibition of corporate expenditures . . . ." Def. Mem. in Supp. at 20. This Court agrees. Given that NCRL falls "squarely within" the category of non-threatening, MCFL-type organizations, *NCRL I* at 714, NCRL poses no threat to the political forum. This Court therefore holds that the § 441b(a) ban on independent expenditures violates NCRL's First Amendment rights without a compelling interest.

IV. 11 C.F.R. § 114.10—Limited Exemption from the § 114.2(b) Ban on Corporate Expenditures

Plaintiffs next challenge 11 C.F.R. § 114.10. 11 C.F.R. § 114.2(b) prohibits "[a]ny corporation whatever . . . from making a contribution . . . in connection with any Federal election [and] [e]xcept as provided at 11 C.F.R. 114.10 . . . from making expenditures with respect to a Federal election." After *MCFL*, it was clear that the ban on corporate expenditures could not be applied indiscriminately to all organizations that took the corporate form. *See MCFL*, 479 U.S. 238, 263, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986). 11 C.F.R. § 114.10 thus reflects an effort by the FEC to comply with the exception for non-profit, non-threatening corporations that was carved out in *MCFL*.

Section 114.10 provides that certain "qualified nonprofit corporations" may be exempt from the prohibition on corporate independent expenditures. It defines a "qualified" nonprofit as one that satisfies the following criteria:

> (1) its only express purpose is the promotion of political ideas and it does not engage in business activities;
>
> (2) it has no shareholders, nor any other persons with any ownership interest or claim on assets or earnings or who receives any benefit that makes it a "disincentive for them to disassociate themselves with the corporation on the basis of a corporation's position on a political issue", including credit cards, education, etc.;
>
> (3) it was not established by a business corporation or labor organization nor does it "directly or

indirectly accept donations of anything of value from business corporations"; and

(4) it is a non-profit under 26 U.S.C. 501(C)(4). 11 C.F.R. § 114.10(c)(1)-(5).

NCRL sets forth a number of characteristics pertinent to the application of § 114.10 to its case:

(1) NCRL is a non-profit corporation that is exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code;

(2) NCRL was not established by a business corporation or labor union, and has no shareholders or other affiliates who have a claim on its assets or net earnings;

(3) NCRL is a "public service organization" that has as its "purpose . . . to gather and disseminate, by all means of communication, accurate up-to-date information on the subjects of abortion, euthanasia . . . their effects on the victim family, the community . . . and to further work for pro-life alternatives to abortion" as well as to "make donations for the public welfare, or for religious, charitable, scientific or educational purposes";

(4) While primarily funded by private contributions from individuals, NCRL has accepted contributions from business corporations in the past. These contributions were insignificant in relation to the total contributions from individuals, and were derived almost exclusively from a program by which telephone customers directed their phone bill refunds to the non-profit at their election.

Verified Complaint at & & 10-12.

NCRL may fall "squarely within" the *MCFL* exemption, *NCRL I*, at 714, but it falls squarely outside the terms of § 114.10. Because of the insignificant contributions it has received from corporations, NCRL fails to meet the requirement that it "not directly or indirectly accept donations . . . from business corporations." 11 C.F.R. § 114.10(c)(4).

Furthermore, NCRL has "engaged in traditional fundraising activities of nonprofit corporations, such as walk-a-thons and raffles, and engages in minor business activities incidental and related to its advocacy of issues, such as receiving special event revenue . . . and revenue from distributing its pro-life literature." Verified complaint at ¶ 25. Such activities qualify as "business activities," further disqualifying NCRL under 11 C.F.R. § 114.10(c)(2).[1]

The FEC's construction of the "qualified non-profit corporation" exemption is a "formal" interpretation of the holding in *MCFL*. Such an approach has been rejected by the Eighth Circuit in *Day* v. *Holahan*, 34 F.3d 1356 (8th Cir. 1994), cert. denied, 513 U.S. 1127, 115 S. Ct. 936, 130 L. Ed. 2d 881 (1995) (stating that "[t]he state goes too far in concluding that the factual findings of MCFL translate into absolutes in legal application") and the Second Circuit in *Federal Election Commission* v. *Survival Education Fund, Inc., et al.*, 65 F.3d 285 (1995) (holding that "[t]he rigidity with

[1] "Business activities" are defined as anything other than "fundraising activities that are expressly described as requests for donations that may be used for political purposes". 11 C.F.R. § 114.10(b)(3)(B)(ii).

which the FEC would have us apply MCFL would impoverish political debate").

Such a strict interpretation of *MCFL* has been rejected in this Circuit. The Court in *NCRL I* "agreed with those circuits that have addressed the question, each of which has held that the list of nonprofit corporate characteristics in MCFL was not 'a constitutional test for when a nonprofit must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in MCFL.'" *NCRL I*, at 417.

By excluding NCRL from the category of "qualified nonprofit corporations," § 114.10 results in a continued infringement of NCRL's constitutional rights, as secured by the First Amendment under *NCRL I*. The Commission admits that "the [*NCRL I*] opinion is clear and controlling" and that NCRL is thus has a "right to make independent expenditures in connection with federal elections" Def. Mem. in Supp. at 20, 21. However, the Commission argues that Plaintiffs therefore lack standing to contest § 114.10. This Court disagrees.

In order to demonstrate standing, a party must show that: (1) it has suffered an injury in fact; (2) there is a causal connection between the injury and the challenged regulation; and (3) there is a likelihood that the injury will be redressed by a favorable decision of the court. *Burke* v. *City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998).

The Commission claims that, as an "exempt" corporation under *NCRL*, NCRL has not and will not in the future be subject to an enforcement action by the FEC under § 114.2(b). They therefore argue that NCRL has suffered no injury. It is well-settled that "[w]hen a plaintiff faces a credible threat of prosecution

under a criminal statute he has standing to mount a pre-enforcement challenge to that statute." *Bartlett*, 168 F.3d. at 710. This "credible threat" will be found, and a case or controversy will exist, where a "non-moribund" statute "facially restrict[s] expressive activity by the class to which the plaintiff belongs" and there is an absence of compelling evidence to the contrary. *New Hampshire Right to Life PAC* v. *Gardner*, 99 F.3d 8, 15 (1st Cir. 1996).

In this case, 11 C.F.R. § 114.2(b), on its face, prohibits independent expenditures by non-qualifying corporations. 11 C.F.R. § 114.10(c)(2) and (c)(4) bar NCRL from achieving "qualified" status. Despite the FEC's unenforceable promise to exercise self-restraint in the matter, NCRL's officers remain subject to criminal liability under these statutes. Because it would be unlawful for them to do otherwise, Plaintiffs have withheld their consent to make independent expenditures out of NCRL's general treasury. Verified Complaint at ¶¶ 33, 34. The injury in this case is therefore "one of self-censorship; a harm that can be realized even without an actual prosecution," *Virginia* v. *American Booksellers Association*, 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988). Because the Plaintiffs' speech has been chilled as a result of § 114.10, an infringement which may be redressed by a ruling of this Court, the Plaintiffs have clearly established standing in this case.

This Court has found that NCRL has a constitutional right to make independent expenditures in connection with federal elections under *MCFL* and *NCRL I*. Section 114.10, by its terms, prohibits NCRL from doing so. Therefore, 11 C.F.R. § 114.10 violates NCRL's pro-

tected First Amendment rights without a compelling interest.

V. 2 U.S.C. § 441b(a) and 11 C.F.R. 114.2(b) Ban on Corporate Contributions

Plaintiffs next challenge the ban on corporate contributions set forth in 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b). 2 U.S.C. § 441b(a) states that "[i]t is unlawful for any . . . corporation . . . to make a contribution . . . in connection with any election to any political office." 11 C.F.R. § 114.2(b) states that "[a]ny corporation whatever or any labor organization is prohibited from making a contribution . . . in connection with any Federal election."

It is well established that direct contributions to political candidates implicate important First Amendment rights, specifically, the textual rights to speech and to petition the government for a redress of grievances, and the non-textual right to associate. "[T]he right of association is a 'basic constitutional freedom,' . . . that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.'" *Buckley*, 424 U.S. at 24-25, 96 S. Ct. 612 (citations omitted). "In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Id.* at 25, 96 S. Ct. 612.

In the instant case, 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b) clearly burden the associational rights of NCRL and other ideological, non-stock, non-profit corporations by prohibiting them from making direct contributions to candidates. The FEC argues that the impact of this burden is lessened by the availability of a

"segregated fund" option. Def. Mem. at 6. Indeed, by virtue of its incorporated status, NCRL *must* form a segregated fund in order to make a limited, direct contribution to a candidate for public office. 2 U.S.C. § 441b(2) allows for such a fund by stating that: "[t]he term contribution . . . shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation . . . ." 2 U.S.C. § 441b(b)(2).

However, in *MCFL*, in the context of independent expenditures, the Supreme Court emphasized the burdensome nature of such funds. Segregated funds are "political committees" under the Act. 2 U.S.C. § 431. They must therefore adhere to significant reporting requirements, staffing requirements and other administrative burdens. *See* 2 U.S.C. § 432. The Supreme Court noted that these "more extensive requirements and more stringent restrictions . . . may create a disincentive for such organizations to engage in political speech." *MCFL*, at 254, 107 S. Ct. 616.

The segregated fund requirement clearly burdens the First Amendment rights of NCRL. "It is not unreasonable to suppose that . . . an incorporated group of like-minded persons might seek donations to support [contributions to] political candidates, by means of garage sales, bake sales, and raffles. Such persons might be turned away by the prospect of complying with all the requirements imposed by the Act." *MCFL*, at 255, 107 S. Ct. 616. Whether the frustrated contributor is North Carolina Right to Life, Inc.,[2]

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[2] Using the reasoning set forth in *MCFL*, the "fact that [NCRL] established a political committee . . . does not change

California Citizens for the Blind, Inc., or Kentucky People for the Trees, Inc., denying such an organization the right to perform the "symbolic act of contributing," *Buckley*, at 21, 96 S. Ct. 612, and thus to associate with candidates espousing similar views is an infringement on First Amendment rights that demands a compelling justification. No such justification is present here.

The FEC argues that *Federal Election Commission et al.* v. *National Right to Work Committee et al.*, 459 U.S. 197, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982) (hereinafter "*NRWC*") set forth compelling justifications for the regulation of corporate contributions. The government interests identified in *NRWC* were: (1) to prevent the "substantial aggregation of wealth" of corporations from being converted into "'political war chests' "used to incur political debts; and (2) to protect individuals who have paid money into a corporation or union for purposes other than the support of candidates. Def. Mem. at 10-12, 15. Neither interest is compelling in this case.

First, the fear of a " 'political warchest'" is misplaced with respect to NCRL. As an MCFL-type corporation, NCRL is "more akin to [a] voluntary political association[ ] than [a] business firm[ ]," *MCFL*, at 263, 107 S. Ct. 616, and "do[es] not pose the danger that has prompted regulation" of corporations in the past. *Id.* at 264, 107 S. Ct. 616. Because NCRL poses no potential threat in light of its non-profit, ideological nature, any

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this conclusion, for the corporation's speech may well have been inhibited due to its inability to form such an entity before that date. Furthermore, other organizations comparable to [NCRL] may not find it feasible to establish such a committee and may therefore decide to forego such speech." *MCFL*, at 255 n.7, 107 S. Ct. 616.

governmental interest in regulating the organization may not be deemed compelling simply by virtue of NCRL's "'use of the corporate form.'" *NCRL*, at 713.

Second, there is no danger of a dissenting shareholder or unionworker in the case of NCRL. The Supreme Court "acknowledged the legitimacy of this concern as to the dissenting stockholder and union member in [*NRWC*] and in *Pipefitters* . . . But such persons, as noted, contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends." *MCFL*, at 260, 107 S. Ct. 616 (citations omitted). By contrast, individuals who contribute to NCRL and other *MCFL*-type organizations are "fully aware of its political purposes, and in fact contribute precisely *because* they support those purposes." *Id.* at 260-61, 107 S. Ct. 616 (emphasis added).

The FEC seeks to distinguish *MCFL* from this case on the basis that "the decision in *MCFL* extended only to 'corporate expenditures.'" Def. Mem. in Supp. at 15. The FEC argues that contributions have been more easily regulated than independent expenditures in the past, so that the ban on corporate contributions may be constitutional as applied to NCRL, even though the corresponding ban on corporate independent expenditures is not. This Court finds the distinction between contributions and expenditures to be immaterial in this case.

A distinction between contributions and expenditures was suggested in *Buckley*, when the Court held that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support", at 20-21. The Court noted that "the quantity of communi-

cation by the contributor does not increase perceptibly with the size of his contribution," *Buckley*, at 21, 96 S. Ct. 612, so that the First Amendment freedoms associated with such a contribution are exercised when the contribution is made—no matter how great or small its size.

This distinction is important in the context of *limitations*, as was the issue in *Buckley*. A contribution *limitation* "involves little direct restraint on . . . political communication, for it permits the symbolic expression of support evidenced by a contribution." *Buckley*, at 21, 96 S. Ct. 612. The issue in this case is not whether the government has a compelling interest in *limiting* contributions—under *Buckley*, it is clear that they do. Moreover, the state's general concerns in light of the "historical role [of direct contributions] in the corruptive process," *MCFL* at 260, 107 S. Ct. 616, are adequately and more directly addressed by the significant dollar limitations on direct contributions contained elsewhere in the Act. *See, e.g.*, 2 U.S.C. § 441a.

The question here is whether the FEC has demonstrated a compelling interest in *prohibiting* even limited contributions by *all* corporations, even those that "do [ ] not pose such a threat." *MCFL*, at 263, 107 S. Ct. 616. Since NCRL is "more akin to [a] voluntary political association than [a] business firm [ ]", *MCFL*, at 263, 107 S. Ct. 616, "the concerns underlying the regulation of corporate political *activity* are simply absent" with regard to NCRL. *Id.* at 263, 107 S. Ct. 616 (emphasis added). These concerns are absent with respect to political activity as a general matter-both in the context of limited contributions as well as independent expenditures. This Court therefore sees no

compelling state interest in banning corporate contributions by NCRL and denying it the opportunity to make "symbolic expression[s] of support," *Buckley*, at 21, 96 S. Ct. 612. Absent a compelling interest, the ban on corporate expenditures in 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b) violates NCRL's protected First Amendment rights.

CONCLUSION

The Constitutional right of NCRL to make independent expenditures and limited contributions has been adequately established. For the reasons discussed above: (1) 2 U.S.C. § 441b clearly infringes that right, by prohibiting NCRL from making independent expenditures or contributions on behalf of a candidate; (2) 11 C.F.R. § 114.2(b) violates that right by prohibiting NCRL from making campaign contributions; and (3) 11 C.F.R. § 114.10 violates that right by failing to exempt NCRL from the § 114.2(b) ban on corporate independent expenditures.

Given that these provisions violate NCRL's constitutional rights without a compelling state interest, Plaintiffs are clearly entitled to declaratory and injunctive relief in this case. At a minimum, this Court may declare the provisions unconstitutional as applied to NCRL. Alternatively, if the First Amendment infringements are "substantial" as judged "in relation to the statute's plainly legitimate sweep," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), this Court may deem them facially unconstitutional.

Whether the infringements in this case warrant such a declaration must be further addressed by the Parties before it is determined by the Court. Plaintiffs are

therefore ordered to submit a Memorandum on this issue within 20 days after the date of this Order. Defendant must submit its Response within 20 days after the Plaintiffs' submission. This Court withholds its judgment regarding Plaintiffs' declaratory and injunctive relief in connection with these grievances until such Memoranda are submitted.

For the reasons discussed above, Plaintiffs' Motion for Summary Judgment is hereby GRANTED to the extent that 2 U.S.C. § 441b(a), 11 C.F.R. § 114.2(b) and 11 C.F.R. § 114.10 violate NCRL's protected First Amendment right to make contributions and expenditures in connection with federal elections. However, the extent of relief associated with this Judgment will be set out in the Court's final order. Defendants' Motion for Partial Summary Judgment and Motion for Partial Dismissal are hereby DENIED. The effect of this ruling is hereby STAYED until the final order has been issued by the Court. The Court will award appropriate declaratory and injunctive relief at that time.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1348
CA-00-2

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS-APPELLEES

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLANT

No. 01-1479
CA-00-2

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS-APPELLANTS

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLEE

Filed: May 16, 2002

On Petition For Rehearing And Rehearing En Banc

Appeallant filed a petition for rehearing and rehearing en banc.

Chief Judge Wilkinson and Judge Widener voted to deny the petition for rehearing. Judge Gregory voted to grant rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Judges Micheal, Motz, King and Gregory voted to rehear the case en banc, and Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the discretion of Chief Judge Wilkinson for the Court.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA, NORTHERN DIVISION

No. 2:00-CV-2-BO(2)

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT, PRESIDENT OF NORTH CAROLINA RIGHT TO LIFE, INC., AND; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

[Filed: Jan. 24, 2001]

ORDER

This matter is before the Court on Defendant's Motion to Extend Time and on the issue of the appropriate remedy to the awarded Plaintiffs in this case. On October 3, 2000, this Court held that NCRL's First Amendment rights were unconstitutionally infringed by the ban on corporate contributions and expenditures set forth at 2 U.S.C. § 441(b) and its implementing regulations, 11 C.F.R. § 114.2(b) and 11 C.F.R. § 114.10. The Court stayed the effects of its order pending briefing on the scope of appropriate relief to be awarded in this case. The parties have submitted briefs on this issue and it is ripe for ruling.

I. Background

Plaintiff North Carolina Right to Life, Inc. ("NCRL") is a non-profit corporation that engages in various charitable practices, which include providing crisis pregnancy counseling, publishing crisis pregnancy literature and promoting alternatives to abortion. NCRL has no shareholders, nor does any part of its net earnings insure to the benefit of any individual. Plaintiff Christine Beaumont is an eligible voter in North Carolina, Plaintiff Loretta Thompson is Vice President of NCRL, Plaintiff Stacy Thompson is a member of the Board of Directors of NCRL, and Plaintiff Barbara Holt is President of NCRL. Defendant, Federal Election Commission ("FEC"), is the independent federal agency with exclusive jurisdiction over the administration, interpretation and civil enforcement of the Federal Election Campaign Act (the "Act"). U.S.C. 437g(a)(5), 437g(c).

Plaintiffs commenced this action on January 3, 2000, by filing a complaint seeking declaratory and injunctive relief. In their complaint, Plaintiffs challenged the constitutionality of blanket prohibitions on corporate political activity that barrred them from making independent expenditures and contributions in connection with federal elections. The challenged prohibitions are contained in the Federal Election Campaign Act and regulations promulgated thereunder. Plaintiffs claimed that, as a non-profit, ideological corporation, NCRL could not be constitutionally subject to such an infringement on its freedom of expression.

After conducting a hearing on the matter and reviewing the briefs submitted by both parties, this Court found that the prohibitions contained in 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 infringed

NCRL's First Amendment rights without a compelling state interest. The fact that 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 unconstitutionally infringed Plaintiffs' rights entitles them to declaratory and injunctive relief in this case. The Court's present task is to determine what scope of remedy is appropriate to address Plaintiffs' injury.

II. Analysis

Plaintiffs argue that 2 U.S.C. § 441(b) and its implementing regulations should be held facially unconstitutional. They claim that the "corporate ban provisions are unconstitutional on their face" and that "[a]nything less than facial invalidation would amount to a judicial invasion of the legislative domain. . . ." Plaintiffs' Memorandum at 2.

However, a court that holds a statute *facially* unconstitutional departs from the traditional rule that courts adjudicate only the issues and the rights of the litigants that are actually before it. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908 (1973) ("facial overbreadth adjudication is an exception to our traditional rules of practice. . ."). Therefore, for a statute to be "facially" invalid, rather than invalid as applied to a particular litigant, its constitutional infringements must be adjudged to be "substantial" in relation to its legitimate uses. *See id.* Therefore, an overbreadth question is "ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is substantial, not only as an absolute matter, but judged in relation to the statute's plainly legitimate sweep." *Id.*

To support its contention that 2 U.S.C. § 441(b) satisfies this "substantial overbreadth" test, Plaintiffs

submit a long list of nonprofit, tax-exempt corporations. Plaintiffs claim that the list "is not nearly representative of all tax-exempt, nonprofit corporations" to which 2 U.S.C. § 441(b) would be illegally applied. On the basis of this list, and a similar list of "ideological corporations" located in North Carolina, Plaintiffs conclude that the statute's unconstitutional infringement is substantial in that it reaches "hundreds, if not thousands, of constitutionally protected ideological corporations."

While Plaintiffs are likely correct that a great number of corporations are entitled to a constitutional exemption from application of 2 U.S.C. § 441(b) and related regulations, Plaintiffs fail to demonstrate that the constitutional infringements caused by 2 U.S.C. § 441(b) and the related regulations are "substantial" in relation to their "plainly legitimate sweep."

First off, Plaintiffs' list of non-profit corporations across the nation fails to distinguish between those non-profit corporations that are entitled to be exempt from the expenditure and contribution bans and those non-profit corporations that should not be exempt. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391 (1990) (holding that a non-profit corporation with for-profit corporate members was not entitled to an exemption from the ban on independent expenditures). Therefore, they fail to provide the relevant national statistics that would show that the unconstitutional infringements caused by the statute and regulations on the national level are "substantial" as an absolute matter.

Moreover, Plaintiffs fail to prove substantiality of the statute's constitutional infringements as a *relative* matter. Plaintiffs claim that the reach of Section 441(b) extends to "hundreds, if not thousands, of constitutionally protected ideological corporations." Plaintiffs' Brief at 11. The Court has already discussed the insufficiency of the date used by Plaintiffs to support this claim. However, even assuming that there are "hundreds, if not thousands" of such corporations, Plaintiffs fail to show that such number is substantial in comparison to the number of for-profit corporations. As Defendants have shown, there were over 4.5 million for-profit corporations in 1997. For each of these 4.5 million for-profit corporations, the statute and promulgating regulations serve the state's compelling interest in preventing corruption or the appearance thereof. In light of these numbers and the importance of the statute's "plainly legitimate" purpose of regulating for-profit corporations, its inadvertent infringement on the rights of "hundreds, if not thousands" does not appear "substantial" in relation.

For the reasons stated in its order of October 3, 2000, this Court is satisfied that 2 U.S.C. § 441(b) and its implementing regulations, 11 C.F.R. §§ 114.2(b) and 114.10, are unconstitutional as applied to NCRL. However, "[i]t is our view that the statute is not substantially overbroad and that whatever overbreadth may exists may be cured through case-by-case analysis of the fact. . ." *See Broadrick*, 413 U.S. at 615.

III. Conclusion

Defendant's Motion to Extend Time to submit its Brief on Remedies is GRANTED. Accordingly, Defendant's Brief is part of the record upon which this Court bases its decision

For the foregoing reasons, the Court hereby declares that 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 are unconstitutional as applied to NCRL, a

non-profit, *MCFL*-type corporation. Defendants are therefore permanently ENJOINED from relying on, enforcing or prosecuting violations of sections 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 as against Plaintiffs, and from relying on, enforcing or prosecuting violations of any other statutory provision whose obligations and restrictions reasonably flow from the aforementioned provisions.

SO ORDERED

This 21st day of January, 2001.

/s/ TERRENCE W. BOYLE
TERRENCE W. BOYLE
CHIEF UNITED STATES
DISTRICT JUDGE

I certify the foregoing to be a true
and correct copy of the original
David W. Daniel, Clerk
United States District Court
Eastern District of North
Carolina
By /s/ SUE A. TOWE
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA, NORTHERN DIVISION

No. 2:00-CV-2-BO(2)

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT, NORTH CAROLINA RIGHT TO LIFE, INC., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

[Filed: Jan. 24, 2001]

JUDGMENT

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the Court hereby declares that 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 are unconstitutional as applied to NCRL, a non-profit, *MCFL*-type corporation. Defendants are therefore permanently ENJOINED from relying on, enforcing or prosecuting violations of sections 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 as against Plaintiffs, and from relying on, enforcing or prosecuting violations of any other statutory provision whose obligations and restrictions reasonably flow from the aforementioned provisions. (Boyle, J)

THIS JUDGEMENT FILED AND ENTERED ON JANUARY 24, 2001 AND COPIES TO:

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January 24, 2001

DAVID W. DANIEL, CLERK

/s/ SUE A. TOWE
SUE A. TOWE
(By) Deputy Clerk

APPENDIX E

STATUTORY PROVISION INVOLVED

Section 441b of Title 2 of the United States Code provides:

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation com-

mittee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or

financial reprisals; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their

residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.